Supreme Court, U.S.
FILED

(1)

No. 97-767

NOV - 3 1997

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CASE CORPORATION, *Petitioner*,

v.

DANIEL FREEMAN, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

87 pp

QUESTIONS PRESENTED

1. Whether the trial court's "gatekeeper" responsibility under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), may be bypassed altogether when an expert testifies about the application of scientific knowledge but purports to rely only on "experience" or "training" rather than on any "technique" or "methodology" of his or her professional discipline.

2. Whether this Court's statement in *Daubert* that "[t]he focus * * * must be solely on principles and methodology, not on the conclusions that they generate," 509 U.S. at 595, precludes the trial court from examining the reasoning that connects an expert's hypothesis to a conclusion about an issue in the case.

RULE 29.6 STATEMENT

Case Corporation has no parent companies. The following is a list of the non-wholly owned subsidiaries of Case Corporation:

Case Steyr Landmaschinentecknik AG
Liuzhou Case Liugong Construction
Equipment Company
Bratstoft Maquinas E Systemas Agro-Industriais S.A.
UzCaseagroleasing
Hay & Forage Industries
Consolidated Diesel Company
Amity Technology L.L.C.
Brahma Steyr Tractors Limited
Megavolt L.L.P.
Ukrainian Agricultural Development Co.
Masstock (Zambia) Limited
Case Equipment Loan Trust 1994-A
Case Equipment Loan Trust 1994-B
Case Equipment Loan Trust 1994-C
Case Equipment Loan Trust 1995-A
Case Equipment Loan Trust 1995-B
Case Equipment Loan Trust 1996-A
Case Equipment Loan Trust 1996-B

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

RULE INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. THE CIRCUITS ARE IRRECONCILABLY SPLIT ON WHETHER *DAUBERT* APPLIES TO EXPERT TESTIMONY CONCERNING THE APPLICATION OF SCIENTIFIC KNOWLEDGE 8

A. *Daubert* Left Unanswered A Number Of Fundamental Questions Concerning The Admissibility Of Expert Testimony 8

B. The Fourth Circuit's Holding Is Inconsistent With *Daubert* And Conflicts With The Decisions Of Other Circuits On Whether And How To Apply *Daubert* To Expert Testimony Involving The Application Of Scientific Principles . . . 10

C. The Fourth Circuit's Approach To *Daubert* Is Fundamentally Flawed 17

D. The Application Of *Daubert* To Testimony Concerning Applied Scientific Knowledge Is An Important And Recurring Question 22

II. THE CIRCUITS ARE ALSO DIVIDED ON HOW TO APPLY THIS COURT'S DIRECTIVE THAT THE FOCUS OF THE INQUIRY MUST BE ON THE EXPERT'S "PRINCIPLES AND METHODOLOGY," NOT ON THE EXPERT'S "CONCLUSIONS." 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Alevromagiros v. *Hechinger Co.*,
993 F.2d 417 (4th Cir. 1993) 3

Bogosian v. *Mercedes-Benz of N. Am., Inc.*,
104 F.3d 472 (1st Cir. 1997) 15

Brock v. *Merrell Dow Pharmaceuticals, Inc.*,
874 F.2d 307 (5th Cir. 1989) 29

Cavallo v. *Star Enterprise*, 892 F. Supp. 756
(E.D. Va. 1995), *aff'd in relevant part*,
100 F.3d 1150 (4th Cir. 1996),
petition for cert. filed (Mar. 19, 1997)
(No. 96-1493) 17

Compton v. *Subaru of America, Inc.*,
82 F.3d 1513 (10th Cir.),
cert. denied, 117 S. Ct. 611 (1996) 5, 13, 16

Cummins v. *Lyle Indus.*,
93 F.3d 362 (7th Cir. 1996) 11, 12, 14, 16

Dancy v. *Hyster Co.*, 1997 WL 590122,
(8th Cir. Sept. 25, 1997) 15

Daubert v. *Merrell Dow Pharmaceuticals, Inc.*,
43 F.3d 1311 (9th Cir.), *cert. deined*,
116 S. Ct. 189 (1995) 27

Daubert v. *Merrell Dow Pharmaceuticals, Inc.*,
509 U.S. 579 (1993) . . . . . *passim*

Deimer v. *Cincinnati Sub-Zero Products, Inc.*
58 F.3d 341 (7th Cir. 1995) 14

In re Paoli R.R. Yard PCB Litig.,
35 F.3d 717 (3d Cir. 1994) 28, 29

Joiner v. *General Electric Co.*,
78 F.3d 524 (11th Cir. 1996),
cert. granted on other grounds,
117 S. Ct. 1243 (1997) 25, 26, 29

McCullock v. *H.B. Fuller Co.*,
61 F.3d 1038 (2d Cir. 1995) 13

McKendall v. *Crown Control Corp.*,
122 F.3d 803 (9th Cir. 1997) 13, 22

Moore v. *Ashland Chemical, Inc.*,
1997 WL 644054 (5th Cir. Oct. 20, 1997) 12

Navarro v. *Fuji Heavy Indus., Ltd.*,
117 F.3d 1027 (7th Cir. 1997)
petition for cert. filed (Sept. 25, 1997)
(No. 97-597) 14, 19, 28, 29

Peitzmeier v. *Hennessy Indus., Inc.*,
97 F.3d 293 (8th Cir. 1996),
cert. denied, 117 S. Ct. 1552 (1997) 15, 16

Pestel v. *Vermeer Mfg. Co.*,
64 F.3d 382 (8th Cir. 1995) 15

Porter v. *Whitehall Lab., Inc.*
9 F.3d 607 (7th Cir. 1993) 17

Raynor v. *Merrell Dow Pharmaceuticals, Inc.*,
104 F.3d 1371 (D.C. Cir. 1997) 28

Rosen v. *Ciba-Geigy Corp.*,
78 F.3d 316, 319 (7th Cir.),
cert. denied, 117 S. Ct. 73 (1996) 27

Smelser v. *Norfolk Southern Ry. Co.*,
105 F.3d 299 (6th Cir. 1997),
cert. denied, 66 U.S.L.W. 3255
(U.S. Oct. 6, 1997) (No. 96-1949) 14

Surace v. *Caterpillar, Inc.*, 111 F.3d 1039
(3d Cir. 1997) 14

Tenbarge v. *Ames Taping Tool Systems, Inc.*,
1997 WL 651986 (8th Cir. Oct. 22, 1997) 16

Tyus v. *Urban Search Management*,
102 F.3d 256 (7th Cir. 1996),
cert. denied, 117 S. Ct. 2409 (1997) 16, 19

United States v. *Bynum*,
3 F.3d 769 (4th Cir. 1993) 18

United States v. *Lee*,
25 F.3d 997 (11th Cir. 1994) 15

Watkins v. *Telsmith, Inc.*, 121 F.3d 984
(5th Cir. 1997) 14, 16, 19

Statutes and Rules

28 U.S.C. § 1332 2

Federal Rule of Evidence 702 . . . . . *passim*

Miscellaneous

Administrative Office of the U.S. Courts, Statistics Division, ANNUAL REPORT OF THE DIRECTOR, table S-7 (unpub. 1996) 22

Lisa Agrimonti, *The Limitations of Daubert and Its Misapplication To Quasi-Scientific Experts*, 35 WASHBURN L.J. 134 (1995) 16

Nelson G. Apjohn & Susan M. Quill, *Post-Daubert Admissibility of Expert Testimony on Mechanical Design and Engineering Issues*, 23 PROD. SAFETY & LIAB. REP. (BNA) 533 (1995) 23

Bert Black, *Winning the Expert Wars in the Age of Daubert*, SB16 ALI-ABA 13 (1996) 24

Development in the Law, *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481 (1995) 9, 22

JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53 (1994) 27

David L. Faigman, *Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony*, 35 WASHBURN L.J. 401 (1996) 17, 19

Nancy S. Farrell, Comment, *Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 13 J. CONTEMP. HEALTH L. & POL'Y 523 (1997) 10

Wendy Fleishman & Russell Jackson, *Challenges to the Admissibility of Expert Testimony: What Works after Daubert?* 723 PLI/COMM 121 (1995) 23

Michael Hoenig, *New Cases on Experts After Daubert*, N.Y. LAW J. 6 (May 13, 1996) 20

Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379 (1997) 20

Donald Patterson, *The Citadel Reburied: Restatement of the Law Third Torts: Products Liability*, 63 DEF. COUNS. J. 191 (1996) 12

Lawrence S. Pinsky, Comment, *The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated By Daubert*, 34 HOUS. L. REV. 527 (1997) 24

Michael C. Polentz, *Post-Daubert Confusion With Expert Testimony*, 36 SANTA CLARA L. REV. 1187 (1996) 8, 10

Anthony Z. Roisman, *Emerging Law: The Expert Witness in Toxic Tort Litigation*, SB52 ALI-ABA 375 (1997) 10

Jonathan R. Schofield, Note, *A Misapplication of Daubert: Compton v. Subaru of America Opens the Gate for Unreliable and Irrelevant Expert Testimony*, 1997 B.Y.U. L. REV. 489 20

Robert L. Stern, et al., SUPREME COURT PRACTICE (7th ed. 1993) 16

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 11, 12

Malcolm E. Wheeler, *How Now, Daubert: Dilemma About Application*, 15 No. 10 Prod. Liab. L. & Strategy 1 (1997) 22, 23

PETITION FOR A WRIT OF CERTIORARI

Case Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-14a) is reported at 118 F.3d 1011. The order denying the petition for rehearing and suggestion for rehearing in banc (App., *infra*, 15a-16a) is not reported. The judgment of the district court (App., *infra*, 17a-49a) is reported at 924 F. Supp. 1456. The district court's order denying Case's motion in limine to exclude the testimony of plaintiff's expert (App., *infra*, 50a) and the memorandum opinion (App., *infra*, 51a-66a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1997, and a timely petition for rehearing with suggestion of rehearing in banc was denied on August 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT

This is a product liability action arising out of injuries sustained in a tractor roll-over accident. On the day of the accident, the plaintiff, Daniel Freeman, was mowing his lawn

with a Case 1130 tractor. App., *infra*, 18a. As he mowed near a steep embankment in his back yard, Freeman struck a partially buried boulder. *Ibid.* He stopped the tractor by releasing the speed ratio control (SRC) pedal, which makes the tractor move forward or backward. *Ibid.* & n.1. Freeman then depressed the clutch, to disengage the power to the blades and wheels, and raised the mower deck to prevent the blades from restriking the rock when restarted. *Id.* at 18a. He then intended to release the clutch, with the engine still running, to spin the blades in the air in an effort to determine whether they had been warped by contact with rock. *Ibid.* Freeman testified that while attempting this maneuver, he thought his foot was on the brake pedal, which is located near the SRC pedal. *Ibid.* In fact, however, Freeman had depressed both the brake and SRC pedals, and when he released the clutch, the tractor moved forward over the embankment. *Ibid.* Freeman jumped off the machine and rolled down the hill. *Id.* at 19a. The tractor also tumbled down the hill, and Freeman was seriously injured when he was struck by the tractor blades, which were still rotating. *Ibid.*

Freeman sued Case Corporation, the manufacturer of the tractor, under theories of negligence and breach of warranty. App., *infra*, 17a. The district court had jurisdiction under 28 U.S.C. § 1332. At trial, plaintiff attempted to prove that the tractor suffered from two design defects that rendered the Case 1130 unreasonably dangerous, *id.* at 20a, a prerequisite to recovery in negligence or warranty under Virginia law. C.A. App. 1677-1679, 1682 (jury instructions). First, plaintiff asserted that the brake pedal was placed dangerously close to the SRC, and that this proximity created an unacceptable risk of inadvertent co-engagement of the pedals. App., *infra*, 20a. Second, he contended that the absence of an operator presence control — a device that stops the engine automatically when the

operator leaves the driver's seat — also made the tractor unreasonably dangerous. *Ibid.*[1]

To prove his design defect theories, plaintiff proffered the testimony of a single expert witness, Smith Reed, a mechanical engineer. App., *infra*, 22a. (As the court of appeals recognized, *id.* at 8a, Reed's testimony was essential to any verdict for Freeman under Virginia law. See *Alevromagiros* v. *Hechinger Co.*, 993 F.2d 417, 421 (4th Cir. 1993).) Reed opined that the Case 1130 was defective because the SRC pedal was too close to the tractor's brakes. C.A. App. 677.[2] As a result, Reed believed that an operator intending to press only the brakes may also inadvertently press the SRC, allowing the tractor to move forward unexpectedly. *Ibid.*

The only bases that Reed gave for his opinion were vague references to his "own observation" and "studies," C.A. App. 707, and his self-professed "[s]ound engineering judgment," C.A. App. 679. Although Reed had reviewed a variety of trade publications and other materials before testifying, he identified only three publications — general documents that "described the human body" and the "expected fatigue rates" of individuals applying "various pedals" — that were relevant to his opinion. C.A. App. 659-664, 707-709. Reed did not, however, explain how any of those documents supported his opinion or what role

---

[1] Because the Fourth Circuit based its decision on the purported pedal defect, the court did not resolve issues related to the absence of an operator presence control device. App., *infra*, 6a n.3. Should this Court grant certiorari and reverse the judgment, those issues would be resolved by the court of appeals on remand.

[2] At trial, Case introduced the testimony of two experts who described a number of real-life applications of the Case 1130 that require the brake and SRC pedals to be in close proximity to one another. C.A. App. 835-837, 1576-1578.

they played in his analysis. Similarly, while Reed performed limited "tests" on the tractor — operating it while trying to recreate the sudden forward movement described by the plaintiff, and placing his foot on the brake and SRC pedals in an effort to determine whether the two pedals could be engaged simultaneously,[3] C.A. App. 668-670 — he did not explain how these "tests" supported his opinion. On cross-examination, Reed admitted that he had not performed any controlled testing on the pedals that could give any indication of the predictability or reliability of his conclusion that the pedal configuration results in inadvertent dangerous co-activation of the pedals. C.A. App. 708, 712. Indeed, Reed testified that his testing established only that it is "plausible" to contact the two pedals simultaneously. C.A. App. 668-669. Finally, Reed did not testify that Case had failed to comply with any government, industry, or other safety standard applicable to the Case 1130. While in a pre-trial report Reed had expressed the opinion that the pedal configuration violated an industry standard, at trial he explicitly "reevaluate[d] [his] position" and testified that he "cannot say that [the pedal configuration] was a violation of this standard or not." C.A. App. 701-703.

In light of the deficiencies in Reed's testimony, Case filed a motion in limine seeking to bar Reed from testifying under the standards set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). App., *infra*, 29a. The district court denied the motion, holding that "*Daubert* applies only to

---

[3] In contrast to Reed's rudimentary "testing" of the Case 1130, Case introduced at trial the results of a study of 1,158 test drives involving a pedal arrangement virtually identical to that of the Case 1130 in which inadvertent misapplication of the pedals occurred less than .2% of the time. C.A. App. 833-835, 838, 840-844, 2114-2115, 2110. This is approximately the same rate at which automobile drivers inadvertently misapply the accelerator and brake pedals. C.A. App. 842-843, 2119.

scientific evidence, of which Reed's proposed testimony was not an example." *Ibid.*; see also *id.* at 50a, 57a.

Based on Reed's testimony, the jury returned a verdict against Case and awarded plaintiff $3.8 million in damages. App., *infra*, 17a. After trial, the district court again rejected Case's argument that Reed's testimony was inadmissible under *Daubert*, *id.* at 31a, but it granted Case's motion for judgment as a matter of law, holding, *inter alia*, that Reed's testimony was insufficient to establish that the pedal configuration on the Case 1130 was defective, *id.* at 23a. The court explained that "Reed's testimony was not sufficient to carry plaintiff's burden, since nothing suggests that the literature reviewed significantly bolstered Reed's opinion that the design of the pedals was defective." *Ibid.* In addition, the district court observed that "Reed's 'sound engineering judgment' was not a basis for his opinion, but rather a mere restatement of that opinion." *Id.* at 22a.

The Fourth Circuit reversed, reinstating the liability finding against Case, and remanded for further proceedings to determine the amount by which the verdict was excessive. The court of appeals affirmed the district court's rejection of Case's *Daubert*-based challenge to Reed's testimony, but on different grounds. App., *infra*, 9a n.6. In particular, the court declined to decide whether the district court was correct in its view that *Daubert* does not apply outside the scientific context. *Ibid.* Instead, the court, following the Tenth Circuit's decision in *Compton* v. *Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), cert. denied, 117 S. Ct. 611 (1996), held that "where an expert relies on his experience and training and not a particular methodology to reach his conclusions, 'application of the *Daubert* [analysis] is unwarranted.'" *Ibid.* In addition, although the court acknowledged that Case had attacked "deficiencies in [Reed's] analysis," *id.* at 11a, it concluded that "Case d[id] not challenge Reed's 'reasoning or methodology' but his ultimate conclusion, that the 1130 is unreasonably dangerous." *Id.* at 9a

n.6. Finally, the court held that Reed's opinion was sufficient under Virginia law to support a jury verdict because (1) Reed applied his experience and training in tractor design in reaching his conclusion; (2) he reviewed numerous published materials before reaching his conclusion; and (3) he inspected and tested the tractor during his investigation. *Id.* at 10a-11a.

REASONS FOR GRANTING THE PETITION

There is no question that the framework adopted by this Court in *Daubert* in 1993 applies to expert testimony concerning subjects that are, in the Newtonian sense, purely scientific (the kind of evidence at issue in *Daubert*). Outside of that context, however, the Court's opinion has generated more questions than answers in the last four years. In particular, the courts of appeals are deeply divided with respect to whether and how the *Daubert* framework applies to expert testimony involving the *application* of scientific knowledge to concrete and practical problems that arise in the course of litigation.

This case is a prototypical example of expert testimony involving "applied science." The plaintiff here sought to introduce the testimony of a mechanical engineer to prove that a product was defectively designed. The district court declined to apply *Daubert* on the ground that engineering testimony is "technical," not "scientific," and that *Daubert* applies only to the latter kind of testimony. App., *infra*, 29a. The court of appeals also held that *Daubert* did not apply, on the slightly different rationale that the testimony of an expert who purports to rely on his "experience and training," instead of any particular "principles or methodology" of engineering science, is exempt from *Daubert* scrutiny. App., *infra*, 9a n.6. As a result, the wholly conclusory testimony of the plaintiff's only "expert" was deemed sufficient to uphold a multi-million dollar jury verdict.

The rulings of the courts below are symptomatic of the pervasive confusion in the lower courts over *Daubert*'s meaning. The Fourth Circuit's holding here is consistent with the views of three other circuits, but it conflicts with the decisions of six other courts of appeals, which have applied *Daubert* to expert testimony involving the application of scientific knowledge regardless of the purported basis for the expert's opinion. In addition, the Fourth Circuit's fundamental misapplication of this Court's admonition that "[t]he focus [of the *Daubert* inquiry] must be solely on principles and methodology, not on the conclusions that they generate," 509 U.S. at 595, also conflicts with the decisions of other circuits.

Taken as a whole, the approach adopted by the court of appeals here seriously undermines the "gatekeeper" obligations imposed on trial courts by Rule 702 and creates a gaping loophole through which experts for hire can completely avoid scrutiny of "expert" testimony that consists entirely of conclusions without reasoning. Here, for example, Reed was permitted to offer his credentials and give his opinion, even though he offered no explanation whatever as to why his conclusion (that the pedal configuration was unreasonably dangerous) followed from the only items that he said were relevant to his opinion — general literature "describ[ing] the human body" and the "forces applied to various pedals," and a "test" showing that it is "plausible" to engage the pedals simultaneously. C.A. App. 668-69, 707-09.

In sum, then, this case offers an ideal opportunity for "further development of this important area of the law." *Daubert*, 509 U.S. at 601 (Rehnquist, C.J., concurring in part and dissenting in part). As in *Daubert* itself, this Court should grant certiorari to resolve the "sharp divisions" among the circuits, 509 U.S. at 585, regarding the scope of *Daubert*'s applicability and the meaning of its commands.

I. THE CIRCUITS ARE IRRECONCILABLY SPLIT ON WHETHER *DAUBERT* APPLIES TO EXPERT TESTIMONY CONCERNING THE APPLICATION OF SCIENTIFIC KNOWLEDGE.

A. *Daubert* Left Unanswered A Number Of Fundamental Questions Concerning The Admissibility Of Expert Testimony.

Among the obvious goals of this Court's decision in *Daubert* was "to provide uniformity among the circuit courts by establishing a structure for the admissibility of expert testimony" under the Federal Rules of Evidence. Michael C. Polentz, Comment, *Post-Daubert Confusion With Expert Testimony*, 36 SANTA CLARA L. REV. 1187, 1200 (1996). This goal was reflected both in the Court's decision to grant certiorari "in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony," *Daubert*, 509 U.S. at 585, and to offer "general observations" that bear on the gatekeeping duties of the federal judiciary, *id.* at 593.

Those gatekeeping responsibilities require district courts, under Rule 702, to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Thus, "[t]he subject of an expert's testimony must be 'scientific * * * knowledge,'" which "implies a grounding in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation." *Id.* at 589-590. To assist the lower court on remand, the Court identified four non-exclusive factors that bear on "whether the reasoning or methodology underlying the testimony is scientifically valid and * * * properly can be applied to the facts in issue." *Id.* at 592-593. These factors are: (1) whether the theory or technique "can be (and has been) tested," (2) whether the theory or technique "has been subjected to peer review and publication," (3) the "known or potential

rate of error" and the existence of "standards controlling the technique's operation," and (4) whether the theory or technique has gained "general acceptance" in the relevant field. *Id.* at 593-594.

While *Daubert* eliminated some of the "sharp divisions" among the circuits, it has resulted in others as the lower courts have struggled to apply its precepts across the spectrum of expert testimony. For example, did the Court intend its *Daubert* analysis to apply to all of the categories of evidence under Rule 702, or merely to the "scientific context" present in *Daubert* itself, or even more narrowly still to "'novel' scientific techniques?" See *Daubert*, 509 U.S. at 590 n.8, 592 n.11. Or, to give another example, where did the Court intend to draw the line between the district court's mandated inquiry into the "principles and methodology" undergirding an expert's opinion and the forbidden inquiry into the expert's "conclusions?" See *id.* at 595. In view of these (and other) interpretive puzzles arising out of this Court's *Daubert* opinion, the summary of the post-*Daubert* state of the law provided by one commentator two years ago remains accurate today:

> Although the *Daubert* Court removed the ambiguity surrounding *Frye*'s 'general acceptance' standard, the decision has created ambiguity surrounding what test to apply in *Frye*'s stead. Beyond merely suggesting four factors to aid lower courts in admissibility determinations, the *Daubert* Court offered no further guidance to help lower courts determine scientific validity. The Court's silence has resulted in judicial and academic debate over the required approach. The pre-*Daubert* confusion that the Court sought to eliminate has been replaced by conflict over how to conduct the reliability analysis under Rule 702.

Development in the Law, *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1488 (1995).

Of course, these problems in the application of *Daubert* were not entirely unexpected. In his separate opinion in *Daubert*, concurring in part and dissenting in part, the Chief Justice (joined by Justice Stevens) "accurately predicted that numerous questions and confusion would arise as district judges tried to apply the Court's opinion." Nancy S. Farrell, Comment, *Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 13 J. CONTEMP. HEALTH L. & POL'Y 523, 534-535 (1997) (citing *Daubert*, 509 U.S. at 598-600 (Rehnquist, C.J., concurring in part and dissenting in part)). By our count (as of October 27, 1997), *Daubert* had been cited in no less than 730 federal cases, 320 state cases and 980 journal and law review articles, comments and notes. See also Anthony Z. Roisman, *Emerging Law: The Expert Witness in Toxic Tort Litigation*, SB52 ALI-ABA 375, 377 (Feb. 12, 1997) (providing figures as of the end of 1996). Yet, "judging by the decisions of courts facing *Daubert* challenges, both the original opinion and all the subsequent thought ha[ve] produced more confusion, not clarity, and ha[ve] delayed, not expedited, the resolution of cases." *Id.* at 377-378; see also Polentz, *supra*, 36 SANTA CLARA L. REV. at 1202 (observing that *Daubert* "breeds confusion rather than clarity"). The questions presented in this case are at the heart of much of the confusion spawned by *Daubert*.

B. The Fourth Circuit's Holding Is Inconsistent With *Daubert* And Conflicts With The Decisions Of Other Circuits On Whether And How To Apply *Daubert* To Expert Testimony Involving The Application Of Scientific Principles.

The essential holding of the court of appeals here is that the trial court's "gatekeeper" responsibility under *Daubert* may be sidestepped completely when an expert testifies about the application of scientific knowledge, but purports to rely only on "experience" or "training" rather than on any "technique" or

"methodology" of the expert's profession. The court's ruling is both inconsistent with *Daubert* itself and in conflict with the decisions of several other circuits. Moreover, the court's reasoning is manifestly incorrect and will serve only to encourage paid experts to jettison the rigorous analysis normally required by their disciplines.

1. As the Seventh Circuit has stated, a close reading of this Court's opinion in *Daubert* "counsels against a wholesale abandonment of the *Daubert* analysis simply because the issue before the court, although rooted in science, involves the application of science to a concrete and practical problem." *Cummins* v. *Lyle Indus.*, 93 F.3d 362, 367 n.2 (7th Cir. 1996). Indeed, *Daubert* itself held that "*any and all* scientific testimony or evidence" must be evaluated for evidentiary reliability. 509 U.S. at 589 (emphasis added).

It cannot seriously be disputed that an engineer's opinion concerning whether a product is defectively designed is "scientific" in nature. Engineering is "the *science* by which the properties of matter and the sources of energy in nature are made useful to man in structures, machines, and products." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 752 (1986) (emphasis added). Reed himself echoed this definition in describing his profession: "An engineer is a person who is knowledgeable in mathematics and *the sciences* and is able to apply those with judgment * * * for the purpose of helping mankind." C.A. App. 643 (emphasis added). In short, engineering testimony concerning whether the design of a product is defective is plainly rooted in scientific knowledge and therefore must be analyzed under *Daubert*.

Likewise, it is clear that engineers and applied scientists like Reed should arrive at their opinions through the scientific method, which is defined as "the principles and procedures used in the systematic pursuit of intersubjectively accessible knowledge and involving as necessary conditions the recognition

and formulation of a problem, the collection of data through observation and if possible experiment, the formulation of hypotheses, and testing and confirmation of the hypotheses formulated." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2033 (1986). And it is equally obvious that the results of applying engineering principles to concrete problems constitute scientific "knowledge" — a term that "'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'" *Daubert*, 509 U.S. at 590 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986)). For these reasons, a court considering the admissibility of expert testimony concerning "applied science," such as engineering, has an "obligation to ensure that the proffered testimony pertains to scientific knowledge." *Cummins*, 93 F.3d at 367-368.

This is particularly true in the context of expert testimony in design defect cases. "Design selection and the development of design alternatives, because they use known scientific principles deductively and scientific method inductively for risk analysis, are therefore clearly 'scientific knowledge,' as those terms are used in the *Daubert* opinion." Donald Patterson, *The Citadel Reburied: Restatement of the Law Third Torts: Products Liability*, 63 DEF. COUNS. J. 191, 199 (1996). The Fifth Circuit recently recognized this very point, stating that "this court and others have recognized the utility of testing as a factor for assessing the reliability of proffered expert engineering testimony in alternative design cases" because "[i]t is self evident * * * that an engineer's proffered conclusion as to a feasible alternative design lends itself to verification by controlled testing or experimentation." *Moore* v. *Ashland Chem., Inc.*, 1997 WL 644054, at *11 n.2 (5th Cir. Oct. 20, 1997). See also, *e.g.*, *Cummins*, 93 F.3d at 369 ("testing is a necessary part of the design process"; without testing, "the witness' proffered opinions could not fairly be characterized as scientific knowledge").

2. Although applied science — like the engineering testimony offered by Reed — is plainly rooted in the scientific method and its results constitute scientific knowledge, the court of appeals refused to subject Reed's testimony to the rigors of *Daubert* scrutiny. The court reasoned that engineering experts testifying on the basis of "experience and training" are wholly exempt from *Daubert* scrutiny. App., *infra*, 9a n.6. In so holding, the Fourth Circuit joined the Second, Ninth, and Tenth Circuits, which have also refused to apply *Daubert* to experts applying scientific knowledge whose testimony is based on their practical experience and training rather than a particular methodology:

- *McCullock* v. *H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995) (*Daubert* does not apply to expert testimony of consulting engineer whose opinion rested on "extensive practical experience");

- *McKendall* v. *Crown Control Corp.*, 122 F.3d 803, 807 (9th Cir. 1997) (*Daubert* does not apply to testimony "based on [expert's] engineering experience and his having investigated hundreds of fork lift cases over the past thirty years");

- *Compton* v. *Subaru of Am., Inc.*, 82 F.3d 1513, 1519 (10th Cir.) (*Daubert* does not apply where expert did not reach his conclusions "based on any particular methodology or technique," but rather "by drawing upon general engineering principles and his twenty-two years of experience as an automotive engineer"), cert. denied, 117 S. Ct. 611 (1996).

The majority of circuits, however, reject the notion that an expert can dispense with methodology if he or she has experience and training. Recognizing that this Court did not distinguish between an expert's experience and his methodology in *Daubert*, these circuits apply *Daubert* to the proposed

testimony of experts purporting to apply scientific knowledge, *regardless of the grounds for the expert's opinion*. The Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have explicitly endorsed the application of the *Daubert* framework to applied science, mostly in the context of deciding whether to admit engineering testimony of the kind at issue in the instant case:

- *Surace* v. *Caterpillar, Inc.*, 111 F.3d 1039, 1055 (3d Cir. 1997) (affirming the district court's decision, in a design defect case, to exclude the testimony of an electro-magnetic engineer under *Daubert*);

- *Watkins* v. *Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997) (applying *Daubert* analysis in determining the admissibility of a civil engineer's testimony in a design defect case);

- *Smelser* v. *Norfolk S. Ry.*, 105 F.3d 299, 303-304 (6th Cir. 1997) (concluding that proposed expert testimony of biomechanical engineer on, *inter alia*, alleged seat belt defect "cannot withstand *Daubert* scrutiny, and should not have been admitted into evidence"), cert. denied, 66 U.S.L.W. 3255 (U.S. Oct. 6, 1997) (No. 96-1949);

- *Cummins* v. *Lyle Indus.*, 93 F.3d 362, 367-368 (7th Cir. 1996) (noting that "our inquiry is governed by *Daubert*" and affirming exclusion of proposed engineering testimony on alleged defect in design of trim press); see also *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1032 (7th Cir. 1997) (applying *Daubert* to affidavit of expert, an experienced consultant in the fields of failure analysis, mechanical safety, and accident reconstruction, and affirming grant of summary judgment for defendant because affidavit was "nakedly conclusional"), petition for cert. filed (Sept. 25, 1997) (No. 97-597); *Deimer v. Cincinnati Sub-Zero Products, Inc.* 58 F.3d 341, 344-45 (7th Cir. 1995) (holding that testimony of proffered expert regarding

alleged defect in design of hypo-hyperthermia machine was inadmissible under *Daubert* where expert did not conduct any studies or apply his analysis to the facts of the case);

- *Peitzmeier* v. *Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) (stating that "the *Daubert* analysis is properly applied" to proposed testimony of engineering expert regarding alleged design defect in tire changer and excluding testimony as "wholly speculative"), cert. denied, 117 S. Ct. 1552 (1997); see also *Dancy v. Hyster Co.*, 1997 WL 590122, at *2 (8th Cir. Sept. 25, 1997) (applying *Daubert* to proposed testimony of mechanical engineer and finding testimony inadmissible because, *inter alia*, it "could be, but had not been, tested"); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382, 384 (8th Cir. 1995) (applying *Daubert* to testimony of mechanical engineer who proposed to testify as to alleged design defect in stump cutter);

- *United States* v. *Lee*, 25 F.3d 997, 999 (11th Cir. 1994) (rejecting the contention that *Daubert* does not apply to the admission of results of tests from machines used to detect trace amounts of cocaine on defendant's personal effects; "on its own terms, *Daubert* applies not only to testimony about scientific concepts but also to testimony about the actual applications of those concepts").[4]

---

[4] The First Circuit has suggested that it would follow a similar course. See *Bogosian* v. *Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 479 (1st Cir. 1997) (affirming exclusion of engineering expert in case involving alleged automobile design defects, stating that "even if *Daubert*'s specific discussion of the admissibility of scientific principles did not strictly apply to [an expert's] testimony, the admissibility of the testimony was still controlled by the requirement of factual relevance and foundational reliability").

The courts of appeals have expressly recognized the existence of this conflict. In *Watkins*, for example, the Fifth Circuit noted that the Seventh and Eighth Circuits, in *Cummins* and *Peitzmeier*, respectively, had disagreed with the Tenth Circuit's decision in *Compton*. 121 F.3d at 989. The *Watkins* Court chose to follow the former approach, dismissing the latter view as "untenable." *Id.* at 990-991. Similarly, in *Tyus* v. *Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996), cert. denied, 117 S. Ct. 2409 (1997), the Seventh Circuit stated that "we do not agree with the Tenth Circuit's decision in *Compton* * * * that [the *Daubert* framework] is limited to cases of novel scientific theories or methodologies." More recently, the Eighth Circuit has noted the conflict, referencing its own decision in *Peitzmeier* and the Ninth Circuit's *McKendall* case. *Tenbarge* v. *Ames Taping Tool Systems, Inc.*, 1997 WL 651986, at *4 n.4 (8th Cir. Oct. 22, 1997).

In sum, then, the conflict is stark, and nearly every circuit has spoken on this issue. This petition thus presents the kind of clear, explicit conflict among the circuits that has historically motivated the exercise of the certiorari jurisdiction. See Robert L. Stern, et al., SUPREME COURT PRACTICE 168-171 (7th ed. 1993). See also, *e.g.*, Lisa Agrimonti, *The Limitations of Daubert and Its Misapplication To Quasi-Scientific Experts*, 35 WASHBURN L.J. 134, 147-148 (1995) (noting the "split among the courts" and "lack of uniformity in *Daubert*'s application, particularly with regard to quasi-scientific experts" such as engineers). Moreover, this circuit conflict is both mature and deep-seated; most of the circuits have opined on this question without anything approaching a clear consensus. See Stern, *supra*, at 170 n.19. Given the severity of the conflict and the recurring nature of the issue presented here, it is time for this Court to step in.[5]

---

[5] Since the Court declined to review the Tenth Circuit's decision in *Compton*, 117 S. Ct. 611 (1996), the conflict among

(continued...)

C. The Fourth Circuit's Approach To *Daubert* Is Fundamentally Flawed.

For a number of reasons, the minority view adopted by the court of appeals here has drawn strong criticism from other circuits and commentators.

1. First, to say that one can determine whether a product is defectively designed from experience and training — without further explanation of the connective reasoning leading from hypothesis to conclusion — is precisely the kind of "I know it when I see it" testimony that *Daubert* does not permit. "*Daubert* commands that in court, science must do the speaking, not merely the scientist." *Cavallo* v. *Star Enterprise*, 892 F. Supp. 756, 761 (E.D. Va. 1995), *aff'd in relevant part*, 100 F.3d 1150 (4th Cir. 1996), petition for cert. filed (Mar. 19, 1997) (No. 96-1493); see also *Porter* v. *Whitehall Lab.*, 9 F.3d 607, 614 (7th Cir. 1993) ("If experts cannot tie their assessment of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury"). The hazard of the Fourth Circuit's approach, as one commentator noted, is that "pseudoscientists could draw the perverse conclusion * * * that the key to admission is to remain unscientific in order to avoid standards they find difficult to meet." David L. Faigman, *Making the Law Safe for Science: A Proposed Rule for the*

---

[5](...continued)
the circuits has become much deeper — the Third, Fourth, Fifth, Sixth, and Ninth Circuits have recently weighed in on one side or the other — and has been explicitly recognized by the circuits themselves. There is no need for further "percolation" in the courts of appeals; all but the First, District of Columbia, and Federal Circuits have taken a firm position on this issue. Cf. note 4, *supra*. In addition, as noted at pp. 17-22, *infra*, the *Compton* approach continues to draw strong criticism from courts and commentators.

Admission of Expert Testimony, 35 WASHBURN L.J. 401, 422 (1996). This is a "scary" prospect because it implies that experts should "not test their hypotheses," even though "*Daubert* * * * require[s] otherwise." *Id.* at 426.

An engineer's "experience" and "training" is entitled to assume the status of expert testimony, if at all, only because he or she has employed the tools of the profession by applying concepts of scientific engineering to a particular issue in the case. The court of appeals, however, evidently believed that Reed could plausibly testify about a purported defect in the pedal configuration without applying accepted principles of engineering. That was simply wrong. The premise underlying the plaintiff's case (and which Reed's testimony was intended to establish) — that the proximity of the SRC and brake pedals on the Case 1130 causes dangerous inadvertent co-engagement of the pedals — is an eminently testable proposition, as demonstrated by the study introduced at trial by Case. C.A. App. 840-843, 2119 (in study involving 1,158 test drives, inadvertent misapplication of the pedals on the Case 1130 occurred less than .2% of the time, which is about the same rate at which automobile drivers inadvertently misapply the accelerator and brake pedals). The Case test was not the only way of testing the hypothesis, but whatever the test, it must be rigorous enough to satisfy the reliability and relevance commands of Rule 702 and *Daubert*.

Reed, however, offered no rigorous testing — by himself or anyone else — to support his opinions. Reed's casual inspection of Freeman's Case 1130 and the elementary testing he performed at Freeman's residence, see pp. 3-4, *supra*, is no substitute for the controlled experiments that should have been undertaken. In the absence of any such testing, Reed's methodology lacked any resemblance to the scientific method, especially in view of Reed's failure to connect any of the materials upon which he claimed to rely to his opinion. *United States* v. *Bynum*, 3 F.3d 769, 773 (4th Cir. 1993) (defining

scientific method as "subjecting testable hypotheses to the crucible of experiment in an effort to disprove them"); Faigman, *supra*, 35 WASHBURN L.J. at 426-427 ("If a discipline advances testable hypotheses, they must be tested before being advanced in court. * * * [T]he law should expect scientists (and scientist-want-to-be's) to rigorously test their hypotheses with all of the tools they have available"). Nonetheless, the Fourth Circuit held that Reed was entitled to offer his opinion, even though he did not demonstrate that his opinion is reliably based on the scientific knowledge that is the foundation of his engineering expertise.

2. The Fourth Circuit's ruling allows purported experts who base their testimony on easily manipulable criteria like "experience and training" to get a free pass to the jury while their more rigorous colleagues who subject their theories to testing, publication, peer review, and the like must satisfy the *Daubert* standards. As the Fifth Circuit commented in criticizing as "untenable" the line of cases followed by the court of appeals here:

> [I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better.

Watkins v. *Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997). Similarly, the Seventh Circuit has held that although "expertise may be based on experience or training," the court still "must" consider whether the expert's "methodology" satisfies the "'standards of intellectual rigor'" set forth in *Daubert*. *Tyus* v. *Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996), cert. denied, 117 S. Ct. 2409 (1997). See also *Navarro* v. *Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1031-1032 (7th Cir. 1997)

(Posner, C.J.) (holding that proposed expert engineer "[must] show how his conclusion * * * is grounded in — follows from — an expert study of the problem" because "a conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence"), petition for cert. filed (Sept. 25, 1997) (No. 97-597).

Commentators likewise have seized on the susceptibility of the minority approach to manipulation by pseudo-experts seeking to avoid easily undertaken testing and analysis. As one observer has recognized, this approach "seems to turn *Daubert* on its head. * * * [A]n expert can get around the *Daubert* inquiry by saying that no methodology was used at all," even though "[i]f there is no methodology, then the expert's opinion is necessarily speculative." Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert* v. *Merrell Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379, 1409 (1997). Indeed, freely admitting testimony by experts who eschew any reliance on standard professional methodology "creates an escape hatch by which *Daubert*'s reliability factors can be bypassed" and "penalize[s] the expert who, laudably, at least attempts to consider science but reward[s] the one who, lamentably, avoids it." Michael Hoenig, *New Cases on Experts After Daubert*, N.Y. LAW J. 6 (May 13, 1996). In sum, the anomalous rule adopted by the Fourth Circuit provides the engineering expert who remains "unscientific" with complete freedom to testify, while his more rigorous colleague must satisfy the *Daubert* standards of reliability and fit before being permitted to take the stand. See also Jonathan R. Schofield, Note, *A Misapplication of Daubert: Compton* v. *Subaru of America Opens the Gate for Unreliable and Irrelevant Expert Testimony*, 1997 B.Y.U. L. REV. 489, 515 ("an expert's testimony that is likely to fail under *Daubert*'s scientific factors could be repackaged under the

guise of technical or nonscientific evidence and could avoid the application of *Daubert*").[6]

3. The Fourth Circuit's interpretation of Rule 702 is not even remotely administrable. The various methods by which an expert may become qualified under Rule 702 — through "knowledge, skill, experience, training, or education" — are overlapping and malleable. This creates the same kind of perverse incentives sketched in the previous paragraphs, as experts will find their testimony more easily admitted if they trumpet their "training" and "experience" as the bases for their opinions. Of course, knowledge and skill can be (and indeed almost always are) the result of experience or training. But to say that the *Daubert* framework disappears when the expert testifies from "experience" or "training," but not when he or she testifies from "knowledge," is thus to invite every expert merely to invoke the means by which he acquired his expertise, rather than the expertise itself, in presenting himself as an expert under Rule 702. It cannot be that the vital requirements set forth in *Daubert* can be so easily manipulated and circumvented.

At its core, the critical function of the trial court's "gatekeeper" duty under *Daubert* is to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. In the absence of a rigorous examination of the scientific bases for the expert's conclusion,

---

[6] Indeed, under a broad reading of the Fourth Circuit's decision, one could conclude that *any* expert purporting to testify on the basis of "experience and training" can evade the strictures of *Daubert*. Thus, for example, the reliability and relevance prongs of *Daubert* would apply to an epidemiologist who has conducted a detailed, controlled study of the relationship between exposure to a substance and incidence of disease, but not to a patient's treating physician who offers an opinion on medical causation on the basis of simply having observed the patient (and perhaps others like her).

however, courts following the approach of the court of appeals here can do no better than to conclude, as the Ninth Circuit did in *McKendall*, that the expert's testimony "is both '*facially* helpful and relevant' and *seemingly* reliable." 122 F.3d at 807 (emphasis added). That is not enough under *Daubert* or Rule 702.

D. The Application Of *Daubert* To Testimony Concerning Applied Scientific Knowledge Is An Important And Recurring Question.

As illustrated by the cases discussed above, the first question presented here — whether and how *Daubert* applies to expert testimony purporting to apply scientific knowledge — is perhaps the most prominent of the unanswered questions generated by *Daubert*.[7] And the need for clear guidance in this area is underscored by the "enormous increase in the use of scientific evidence" in federal litigation in recent years. Development in the Law, 108 HARV. L. REV. at 1485.

Much of this increase has taken place in the context of the explosion in product liability actions, nearly 39,000 of which were filed in the federal district courts in the 12 months ending on June 30, 1996 alone. Administrative Office of the U.S. Courts, Statistics Division, ANNUAL REPORT OF THE DIRECTOR, table S-7 (unpub. 1996). Whether a particular product is defective almost always involves expert testimony — often by an engineer — and at the moment, whether that testimony will be admissible depends more on the circuit in which an action happens to be filed than on the substance of the expert's testimony. See Malcolm E. Wheeler, *How Now, Daubert:*

---

[7] In fact, the questions raised in this petition are closely related to the Chief Justice's query in *Daubert*: whether there is any meaningful difference under *Daubert* between "scientific" and "technical" knowledge. See 509 U.S. at 600 (Rehnquist, C.J., concurring in part and dissenting in part).

Dilemma About Application, 15 NO. 10 PROD. LIAB. L. & STRATEGY 1, 1 (1997) ("the uncertainty in and disparity among the lower courts have become particularly evident when the proffered expert testimony is opinion testimony that a particular product design is defective or unreasonably dangerous"); Wendy Fleishman & Russell Jackson, *Challenges to the Admissibility of Expert Testimony: What Works after Daubert?* 723 PLI/COMM 121, 123 (1995) ("One of the most critical issues in products liability litigation today is the admissibility of expert testimony. Indeed, for many such cases, having admissible expert testimony is a prerequisite to recovery, as the nature of the plaintiff's injuries — as well as their potential causes — are beyond the experience of the average lay juror").

In the particular area of design defect cases, there is even a more critical need for uniformity on the *Daubert* issue, since most products, as here, are distributed nationwide. Moreover, in design cases, "experts are routinely asked to address product safety performance, safer alternative designs, and issues of causation, all of which are likely to raise *Daubert* red flags." Nelson G. Apjohn & Susan M. Quill, *Post-"Daubert" Admissibility of Expert Testimony on Mechanical Design and Engineering Issues*, 23 PROD. SAFETY & LIAB. REP. (BNA) 533, 557 (1995). And in cases — like this one — in which the plaintiff proffers the testimony of a single expert on the issue of design defect, the *Daubert* ruling often will be dispositive of the entire action.

II. THE CIRCUITS ARE ALSO DIVIDED ON HOW TO APPLY THIS COURT'S DIRECTIVE THAT THE FOCUS OF THE INQUIRY MUST BE ON THE EXPERT'S "PRINCIPLES AND METHODOLOGY," NOT ON THE EXPERT'S "CONCLUSIONS."

This Court stated in *Daubert* that the "focus" of the admissibility inquiry "must be solely on [the expert's] principles and methodology, not on the conclusions that they generate."

509 U.S. at 595. The Court did not elaborate on this pronouncement, and the circuits are now divided on how to characterize, and thus rule on, a challenge to the reasoning (or lack thereof) connecting an expert's data to his conclusions. See generally Lawrence S. Pinsky, Comment, *The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated by Daubert*, 34 HOUS. L. REV. 527, 542 (1997) (noting the "confusion regarding the Court's focus on the methodology and seeming placement of the conclusions beyond the scope of consideration"); Bert Black, *Winning the Expert Wars in the Age of Daubert*, SB16 ALI-ABA 13, 19 (1996) (discussing differing views on "*Daubert*'s distinction between methodology and conclusions"). As explained below, there is a circuit split concerning whether this Court meant to impose a rigid compartmentalization of the trial court's review of the expert's "methodology" and his "conclusions," or whether a proper "focus" on "methodology" means that the court must carefully examine each link in the chain of an expert's reasoning from hypothesis all the way up to ultimate conclusions.

1. The Fourth Circuit opted for the former view. The court concluded that a challenge to an expert's reasoning presented only a jury question relating to the expert's "conclusions," rather than an admissibility question. Thus, although the court of appeals recognized that Case had challenged the "deficiencies in [Reed's] analysis," the court stated nonetheless that "Case does not challenge Reed's 'reasoning or methodology' but his ultimate conclusion, that the 1130 is unreasonably dangerous." App., *infra*, 9a n.6, 11a. In short, even though Case was challenging the absence of any sound basis for Reed to extrapolate from the materials he reviewed and the limited testing he performed to his ultimate conclusion that the Case 1130 was defectively designed, the

court interpreted this as a challenge to Reed's conclusion *qua* conclusion.[8]

The Eleventh Circuit adopted a similar approach in *Joiner* v. *General Electric Co.*, 78 F.3d 524 (11th Cir. 1996), cert. granted on other grounds, 117 S. Ct. 1243 (1997). The majority opinion in the court of appeals held that in conducting a *Daubert* inquiry, the district judge must "view[ ] the bases of an expert's opinion as a whole," *id.* at 533, instead of reviewing "individual studies" or "pieces of evidence," *id.* at 532. Or, as Judge Birch observed in his concurring opinion, determining "[w]hether the conclusions advanced from the stated premises in fact follow" is not part of the district court's gatekeeping role. *Id.* at 534 (Birch, J., concurring). In sum, as the *Joiner* majority explained,

> Opinions of any kind are derived from individual pieces of evidence, each of which by itself might not be conclusive, but when viewed in their entirety are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply. As the Supreme Court said in *Daubert*, "[t]hese conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the

---

[8] It is clear that Case's objection to Reed's testimony is based on the complete absence of any reasoning explaining how Reed got from the data he considered (three publications and the "tests" that Reed conducted) to his conclusion. See Pet. C.A. Br. 24 (arguing that "Reed's opinions do not pass muster under *Daubert*" because, *inter alia*, "Reed admittedly offered no testing by himself or others that supports his opinions," "Reed's methodology bears no resemblance to the scientific method," and "[Reed] made no effort to justify his conclusions by citation to published studies or applicable industry standards").

> appropriate safeguards *where the basis of scientific testimony meets the standards of Rule 702."*

Id. at 532 (emphasis added).

The Fourth Circuit here, in similar fashion, concluded that the opportunity in cross-examination to "highlight[ ] what it perceived to be deficiencies in [Reed's] analysis * * * afforded Case the 'appropriate means' for discrediting the expert testimony it found suspect." App., *infra*, 11a. And, like the Eleventh Circuit, the Fourth Circuit also relied on language from Daubert in support of its reasoning: "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky *but admissible* evidence.'" *Id.* at 12a (emphasis added) (citing *Daubert*, 509 U.S. at 596).

2. While the court of appeals below and the Eleventh Circuit believed that *Daubert* supported their conclusions about the proper means of probing weaknesses in an expert's analysis, any such reliance is misplaced. In particular, the language from *Daubert* emphasized in the foregoing paragraphs clearly indicates that a condition precedent to the use of the "conventional devices" to which the courts of appeals looked is that the expert opinion in question "meets the standards of Rule 702" and therefore is "admissible." 509 U.S. at 596. Thus, every step in the Rule 702 analysis must be complete before *Daubert* gives way to cross-examination as a tool for testing the "perceived * * * deficiencies," App., *infra*, 11a in an expert's analysis.

Contrary to the views of the court of appeals below and the Eleventh Circuit, whether an expert's stated conclusions in fact follow from his premises is not simply a matter for cross-examination, but rather is a critical inquiry in assessing the reliability of an expert's proposed testimony under *Daubert* and Rule 702. This is, at bottom, an inquiry into the expert's

methodology; as one observer concisely summarized, "[m]ethodology involves the process by which the expert arrived at her conclusion." JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53, 69 (1994).

3. The view that *Daubert* does not require a detailed examination of an expert's methodology as a precondition of admitting his testimony misapprehends both the nature of science and the rigor with which federal courts must ascertain the "good grounds" for an expert's opinion. Science, as this Court recognized in *Daubert*, "'is not an encyclopedic body of knowledge about the universe.'" 509 U.S. at 590. Nor is it simply raw data or bare conclusions. Rather, science "represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement." *Ibid.* As scientists work to prove (or disprove) various theories, they build on their own and each others' work in progressing, often one step at a time, from hypothesis to conclusion. While "arguably, there are no certainties in science," *ibid.*, the rigorous empiricism of the scientific method "'is what distinguishes science from other fields of human inquiry,'" *id.* at 593.

The Fourth Circuit's approach undermines this empiricism by preventing trial judges from undertaking a critical inquiry that goes to the essence of *Daubert* — namely, whether the purported bases for an expert's opinion actually support that opinion. As several courts of appeals have recognized, *Daubert* requires gatekeepers to ascertain that jurors are exposed only to real science, not merely the unsupported conclusions of well-credentialed scientists. See, *e.g.*, *Rosen* v. *Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.) (Posner, C.J.) ("'an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process'"), cert. denied, 117 S. Ct. 73 (1996); *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir.) (Kozinski, J.) ("We've been presented with only

the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough"), cert. denied, 116 S. Ct. 189 (1995). Close scrutiny of not only the data or underlying bases of expert scientific opinions, but also the reasoning that connects the data to an issue in the case, prevents clever experts-for-hire from tainting the jury with ultimate conclusions that do not follow from the purported bases for those conclusions.

4. Thus, it is not surprising that most of the courts of appeals applying *Daubert* have agreed that the distinction between methodology and conclusions upon which the court of appeals here evidently relied "has only limited practical import," *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 746 (3d Cir. 1994), and does not inhibit the district court's duty to sift through the stated bases for an expert's conclusion to confirm that his reasoning is sound (*i.e.*, that it is "scientific knowledge" and that it "fits" the case). See, *e.g.*, *Raynor* v. *Merrell Pharmaceuticals, Inc.*, 104 F.3d 1371, 1374-1375 (D.C. Cir. 1997) (noting that the line between methodology and conclusions "is not all that clear, as propositions may be formulated as conclusions or methodologies with comparatively minor linguistic adjustment"). And a number of circuits have held that faithfulness to *Daubert*'s "reliability" prong requires courts, in exercising their gatekeeping role, to carefully examine each link in the chain of reasoning or methodology underlying the expert's proposed testimony. As the Third Circuit has explained,

> *Daubert*'s requirement that the expert testify to scientific knowledge — conclusions supported by good grounds for each step in the analysis — means that *any* step that renders the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*

Paoli R.R. Yard, 35 F.3d at 745 (emphasis in original).

The Seventh Circuit also has firmly endorsed this view. In a recent design defect case, Chief Judge Posner explained that one of the criteria of *Daubert*, "as we have been at pains to emphasize, is that the expert show how his conclusion * * * is grounded in — follows from — an expert study of the problem." *Navarro*, 117 F.3d at 1032; see also *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 309-310 (5th Cir. 1989) ("courts must critically evaluate the reasoning process by which the experts connect data to their conclusions in order for courts to consistently and rationally resolve the disputes before them"); cf. *Joiner*, 78 F.3d at 535 (Smith, J., dissenting) (observing that the failure to examine the expert's connective reasoning reduces the court (and the jury) to "accept[ing] blindly the expert's word to fill the analytical gap between proffered 'scientific knowledge' and the expert's conclusions").

In the absence of rigorous examination of each step in an expert's analysis, from hypothesis to conclusion, courts and juries would have to rely on the word of hired experts — here, Reed's statement that he had exercised "[s]ound engineering judgment," C.A. App. 679 — that their opinions constituted "scientific knowledge" and "fit" an issue in the case. It is simply inconceivable that this Court abdicated to each individual expert the responsibility for ensuring compliance with the Federal Rules of Evidence. Rather, under *Daubert*, the district court, in fulfilling its gatekeeping duty, must make a preliminary determination that an expert's proposed opinion rests on "good grounds" all the way from hypothesis to ultimate conclusion about an issue in the case. See *Paoli R.R. Yard*, 35 F.3d at 745. This step — which the court of appeals omitted altogether — establishes the trustworthiness of "any and all" scientific opinions that are submitted to the jury.

In forgoing any examination of an expert's connective reasoning, the Fourth and Eleventh Circuits have created a huge "escape hatch" through which experts can avoid any serious inquiry into the reliability of their experienced-based "scientific" conclusions that, ironically, their more rigorous colleagues still must face. In these circumstances, it becomes the scientist himself (and not the science he has performed) that attests to the reliability of the opinion. *Daubert* does not permit this type of self-authentication by paid experts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

NOVEMBER 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1626

DANIEL FREEMAN,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the
	*	United States
and MARY FREEMAN,	*	District Court for
	*	the Western
Plaintiff,	*	District of
	*	Virginia.
	*	
v.	*	Hon. Glen M.
	*	Williams,
CASE CORPORATION, a/k/a	*	Judge Presiding
J.I. Case Company, A Tenneco	*	
Corporation; CASE	*	
INTERNATIONAL,	*	
	*	
Defendants-Appellees.	*	

Argued: May 6, 1997

Decided: July 8, 1997

Before HAMILTON and MOTZ, Circuit Judges, and LEGG, United States District Judge for the District of Maryland, sitting by designation.

DIANA GRIBBON MOTZ, Circuit Judge:

In this product liability diversity case, after the jury awarded the plaintiff substantial damages, the district court granted the defendant's motion for judgment. Because the district court erred in concluding that the hazard presented by defendant's product was open and obvious as a matter of law, and because sufficient evidence supported the jury verdict, we reverse and remand for further proceedings.

I.

Daniel Freeman purchased a Case International 1130 tractor with a mower attachment ("1130" or "mower" or "tractor") to care for his lawn. On May 22, 1992, the second time he used the 1130, Freeman suffered a serious accident.

While Freeman was mowing his lawn near a rocky slope, the mower blades glanced against a partially-buried boulder. Freeman lifted his foot off the speed ratio control pedal, bringing the tractor to a stop; he then pushed in the clutch and brake pedals and raised the mower attachment, intending to see if the rock had damaged the blades. Freeman had never used the brakes before because the mower is designed not to move unless the rider is pressing the speed ratio control pedal. Freeman removed his foot from the clutch to allow the blades to spin in order to check their alignment, planning then to back away from the boulder. Suddenly, the mower lunged forward, toward, and then over, the rocky embankment. Freeman leapt away from the machine, rolling forty feet down the hill. He came to rest on his stomach, safely, but the 1130 tumbled down on top of him, with the mower blades still activated. The blades severely and permanently injured him.

Freeman initiated this action against Case asserting negligence and breach of implied warranties. Two asserted defects in the mower provided the factual basis for both of these theories.

First, Freeman alleged that the brake pedal, which was located directly above the speed ratio control pedal, was too close to that pedal so that when a rider released the clutch and attempted to brake the mower, he risked pushing both pedals at the same time. Simultaneous engagement caused the 1130 to lurch forward once the clutch was released because the brakes were unable to override the mower's forward propulsion.[1] Freeman maintained that this defect caused his accident.

Freeman also claimed that the 1130 was defective because it was not equipped with an operator presence control device, which would have discontinued power to the mower blades as soon as Freeman's weight left the tractor seat. If the mower had been designed with an operator presence control device, Freeman contended, the blades would have been moving much more slowly, if at all, by the time they hit him, and would not have injured him so badly.

A jury heard the case for seven days in October and November 1995 and awarded Freeman $3.8 million in compensatory damages. On a special verdict form the jury expressly found that Case negligently designed the 1130 in a manner that made it unreasonably dangerous, that the negligence proximately caused the accident, that Freeman was not contributorily negligent, and that he did not assume

---

[1] The mower is equipped with split brakes to allow for separate braking of the rear wheels. The brakes can be latched together for straight braking and apparently were so latched at the time of the accident. Although there does not appear to be direct evidence on this point, no party has suggested to the contrary.

the risk of injury by voluntarily exposing himself to a known danger. The jury also found that Case breached its "implied warranty of merchantability and/or fitness for a particular use," that Freeman did not unforeseeably misuse the mower, and that the defects that made the 1130 unreasonably dangerous were not open and obvious.

Case moved for judgment as a matter of law and a new trial. On April 19, 1996, the court granted Case judgment as a matter of law because it found that the proximity of the pedals and the absence of the operator presence control device were open and obvious hazards. *See Freeman v. Case Corp.*, 924 F. Supp. 1456, 1467-68 (W.D. Va. 1996). The court also concluded that although Freeman had presented sufficient evidence of an unreasonably dangerous defect in the lack of an operator presence control device, he failed to present sufficient evidence of an unreasonably dangerous defect in the pedal configuration. *Id.* at 1462-64. Additionally, the court held that Freeman had failed to establish a breach of the implied warranty of fitness for a particular purpose and entered a conditional order granting a new trial on that issue. *Id.* at 1464. Finally, the court preliminarily determined that the $3.8 million jury award was excessive. *Id.* at 1473-74.

Freeman appeals. Because our jurisdiction is based on diversity of citizenship — a suit by a Virginia resident against a Delaware corporation — we must apply the law of the state where the accident occurred, Virginia. In doing so, we review de novo the district court's grant of judgment as a matter of law to determine whether the evidence presented at trial, viewed in the light most favorable to Freeman, would have allowed a reasonable jury to render a verdict in his favor. *See Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996). We review the district court's conditional grant of a motion for new trial for abuse of discretion, *see City of Richmond v. Madison Management*

Group, Inc., 918 F.2d 438, 458 (4th Cir. 1990), recognizing that an error of law constitutes an abuse of discretion. *See United States v. Koon*, 116 S. Ct. 2035, 2047 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

II.

The district court held, as a matter of law, that the mower's asserted defects were open and obvious.[2] If that conclusion is correct, it bars Freeman's recovery under either a contract or tort theory. This is so because in Virginia, a plaintiff cannot recover for a breach of an implied warranty or negligence if the "purported defect of which the plaintiff complains was 'known, visible or obvious' to him." *Wood v. Bass Pro Shops, Inc.*, 462 S.E.2d 101 (Va. 1995) (citing *Brockett v. Harrell Bros.*, 143 S.E.2d 897, 902 (Va. 1965)) (applying open and obvious defense in warranty); *Harris-Teeter, Inc. v. Burroughs*, 399 S.E.2d 801 (Va. 1991) (applying open and obvious defense in negligence).

---

[2] Case also asserted two other affirmative defenses at trial, which it reasserts on appeal: unforeseeable misuse and contributory negligence. Both the jury and the district court rejected the unforeseeable use defense and, contrary to Case's assertion on appeal, that decision was clearly correct. Information contained in the 1130's promotional literature and owner's manual provides solid evidence that Case contemplated Freeman's actions, including lawn mowing on slopes, in designing and marketing the 1130. As to contributory negligence, although the jury found Freeman was not contributorily negligent, the district court granted Case judgment as a matter of law on this point. In view of our holding here, we need not evaluate the merits of that determination because even if the district court were correct, contributory negligence could not bar Freeman's warranty claim. *See Brockett v. Harrell Bros.*, 143 S.E.2d 897, 902 (Va. 1965) (holding that contributory negligence is not a defense to a breach of warranty claim).

"A risk is open and obvious if the person using the product is or should be aware of the risk." *Austin v. Clark Equip. Co.*, 48 F.3d 833, 836 (4th Cir. 1995) (interpreting Virginia law). Whether a hazard is open and obvious is a question of fact, and should be left to the jury when "the evidence [is] in conflict." *Morgen Indus., Inc. v. Vaughan*, 471 S.E.2d 489, 492-93 (Va. 1996).

In granting judgment to Case, the district court determined that the arrangement of the brake and speed ratio control (SRC) pedals was open and obvious. While this may be true, it is not dispositive of the issue. The relevant question under Virginia law is not whether the defect itself — here the pedal arrangement — was obvious, but whether the hazard — the risk of inadvertent coengagement causing the tractor to lurch after release of the clutch — was open and obvious.[3]

For example, in *Morgen*, 471 S.E.2d at 491, the asserted defect was an unguarded "nip point." The nip point is simply the point on a rail where the rail meets a wheel rolling on it, a design feature clearly visible to an observer. The plaintiff's expert testified nevertheless "that 'nip points' are not *dangers* that are obvious to most people." *Id.* (emphasis added). Despite testimony to the contrary, the Virginia Supreme Court found that "the jury was entitled to accept [the expert's] testimony that the hazard was not open and obvious." *Morgen*, 471 S.E.2d at 492. Thus, Virginia law looks not to whether the defect itself was obvious, but whether the *hazard* was clearly apparent.

---

[3] Because we conclude that the hazard of inadvertent coengagement of the two pedals leading to unexpected lurching was not open and obvious, we need not reach the question of whether the absence of an operator presence control device also presented an open and obvious hazard.

Here, the hazard — that the pedals could easily be inadvertently coengaged and that coengagement could cause the mower to lurch because the brakes would not override the SRC — is far from obvious. Indeed, an operator might well not realize that the mower's pedals were coengaged unless he looked down at his feet. Unlike the accelerator pedal in an automobile, the SRC operates on hydrostatic principles; pressing the SRC does not affect engine speed so the operator would not perceive a change in engine noise due to faster engine rotation were the SRC inadvertently engaged.

Moreover, Case's expert testified that the brakes should overpower the SRC if an operator simultaneously pushes both pedals. This testimony alone would prevent a conclusion as a matter of law that the hazard caused by the brake's failure to override the SRC was "obvious." Case itself said such a hazard did not exist. Finally, the jury examined Freeman's mower in detail — two jurors actually sat in the operator's position, observed the pedals from that perspective, and pushed them — before the jury concluded that the defect was not open and obvious.[4]

Viewing the evidence in the light most favorable to Freeman, as we must, the jury could reasonably have determined that the hazard presented by the pedals' proximity combined with the strength of the brakes relative to the SRC was not open and obvious. Case was not entitled to judgment as a matter of law on this basis.

---

[4] Case argues on appeal that a new trial is necessary merely because some jurors sat on the tractor. *See United States v. Beach*, 296 F.2d 153 (4th Cir. 1961). The district court rejected this argument, as do we. The jurors' inspection of the tractor merely constituted "a more critical examination of an exhibit." *Id.* at 159 (citation omitted). Such an examination is permissible. *Id.*

III.

Our conclusion that the district court erred in finding the alleged hazards "open and obvious" as a matter of law does not automatically require reinstatement of the jury verdict. This is so because the district court alternatively held that Freeman failed to present sufficient evidence that the pedal configuration and attendant hazard constituted an unreasonably dangerous design defect under Virginia law and so Case might be entitled to judgment on this ground.[5] We believe, however, that Freeman presented sufficient evidence from which a jury could conclude that the pedal configuration and associated risk of sudden forward movement made the 1130 unreasonably dangerous.

To establish this defect, Freeman presented testimony by Smith Reed, an expert in mechanical engineering, who belonged to a number of engineering societies and had successfully completed the examinations necessary to become a registered professional engineer. Reed had previously

---

[5] The district court also indicated that were this court to find the open and obvious affirmative defenses inapplicable, but that the evidence as to the hazard presented by the pedal configuration was insufficient, it would consider granting a new trial. The court believed that in that case a new trial might be warranted because the evidentiary insufficiency might have been due to its own decision to exclude all evidence regarding competing products, which it feared might have been erroneous. *See Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420-21 (4th Cir. 1993) (finding that "actual industry practices," in the aggregate, could indicate consumer expectations, one way to prove unreasonably dangerous design) (citing *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991)). The district court never granted a conditional new trial on this issue and, of course, since we hold that Freeman has presented sufficient evidence to the jury to sustain its verdict, a new trial to allow Freeman to present additional evidence would obviously be unnecessary.

testified as an expert in mechanical engineering in federal court in the Eastern District of Virginia — most recently just a week before trial. Reed also had spent several years working for one of Case's competitors designing mowers and tractors. Case did not object to Reed's engineering qualifications or expertise in the field of mechanical engineering. Nor did Case maintain that Reed's testimony was not relevant. But Case did assert that Reed's testimony was legally insufficient.

The district court rejected Case's argument and permitted Reed to testify before the jury.[6] Post-trial, however, the

---

[6] The district court refused to hold Reed's testimony inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), reasoning that *Daubert* only applied to scientific testimony and not technical testimony, like Reed's. We need not here decide the question that the Supreme Court left open, *i.e.* whether the *Daubert* analysis applies outside the scientific context, because Case misunderstands the *Daubert* test in attempting to apply it here. *Daubert* instructs district courts to make a "preliminary assessment of whether the reasoning or methodology" underlying expert testimony "is scientifically valid." *Id.* at 590 n.8, 592-93. Essentially, Case does not challenge Reed's "reasoning or methodology" but his ultimate conclusion, that the 1130 is unreasonably dangerous. In cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusions, "application of the *Daubert* [analysis] is unwarranted." *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996); *see also United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997) (holding *Daubert* inapplicable to testimony based on experience or training); *United States v. 14.38 Acres of Land, More or Less Situated in LeFlore County*, 80 F.3d 1074, 1078-79 (5th Cir. 1996) (same); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (same). Thus, we affirm the district court's rejection of the *Daubert* challenge to Reed's

(continued...)

court concluded that although it was a "difficult question," Reed's testimony was insufficient to support the jury's finding. *Freeman*, 924 F. Supp. at 1463. In reaching this conclusion, the court relied heavily on our decision in *Alevromagiros v. Hechinger*, 993 F.2d at 417, 421 (4th Cir. 1993). There, we refused to credit an expert witness who "testified to no customs of the trade, referred to no literature in the field, and did not identify the reasonable expectations of customers," but merely gave "his own subjective opinion." *Id.* *Alevromagiros*, however, does not compel the conclusion that Reed's testimony was insufficient in this case.

Unlike the expert in *Alevromagiros*, Reed did not simply opine on the basis of his "own subjective opinion." Rather, he applied his experience and training in tractor design in reviewing numerous published materials, including papers by the Society of Agricultural Engineers, extensive industry literature, various tractor specifications, and trade journals before reaching his conclusions. Reed also inspected Freeman's 1130 and performed various tests on it, which indicated that the tractor did indeed lurch when both the SRC and brake pedals were pressed and the clutch released.[7] In

---

[6](...continued)
testimony, albeit on somewhat different grounds.

[7] Case protests that Reed's testing of the 1130 was inadmissible because the testing conditions were not sufficiently similar to those at the time of the accident, since the tractor was no longer in its original condition. However, the district court acted within its discretion in admitting this testimony. Such tests are only inadmissible when testing conditions are "so dissimilar to the conditions existing at the time of the accident '. . . in such fundamental and important respects that the risk of prejudice to . . . [the defendant] outweighs the probative value of the evidence.'" *Chase v. General Motors Corp.*, 856 F.2d 17, 20 (4th Cir. 1988) (citing *Gladhill v. General Motors Corp.*, 743 F.2d
(continued...)

view of the published authorities, his inspection of the 1130, and his "sound engineering judgment," Reed opined that the 1130's pedal design was unreasonably dangerous. Although Reed could not cite any published source that analyzed the 1130's specific configuration and found it defective, Reed clearly applied his expertise and knowledge of the published sources and drew from his detailed inspection of the product itself in evaluating the configuration at issue here. Significantly, he identified specific published materials that had directly guided his analysis. Virginia law is clear that an expert opinion need not find direct support in published sources; some analogies will have to be drawn. *See Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 679 (Va. 1982) (finding that when "safety standards . . . had never been promulgated, . . . it was a matter of opinion of trained experts what design was safe for its intended use").

Case thoroughly cross-examined Reed and at that time highlighted what it perceived to be deficiencies in his analysis. Case also introduced the testimony of its own expert, who asserted a contrary theory. Case does not challenge the court's instructions to the jury as to burden of proof or as to how the jury was to assess the expert testimony. Thus, the court afforded Case the "appropriate means" for discrediting the expert testimony it found suspect. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination,

---

[7](...continued)
1049, 1052 (4th Cir. 1984)). Here, a Case employee acknowledged that the only significant change in the condition of the tractor after the accident was that its battery had died.

In addition, Case inaccurately claims that neither Freeman nor Reed "made any reference to simultaneous clutch use as a defect in the tractor." In fact, both Freeman and Reed testified at length regarding the relationship between clutch use and the accident. *See* J.A. 227-29, 264, 346-61, 667-70, 677.

presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

Reed's testimony regarding the pedal arrangement, particularly when combined with the jury's opportunity to inspect the tractor itself and judge the likelihood (or not) of inadvertent coengagement, was sufficient to sustain the jury's verdict that the pedal design and associated risk of lurching was unreasonably dangerous.

IV.

The district court believed that a new trial would be required, even if it erred in its ruling on the obviousness of the design defect, because of the imprecise phrasing of the warranty question on the special verdict form.

The special verdict form asked the jurors to determine whether "the defendant breached an implied warranty of merchantability and/or fitness for a particular purpose;" the jurors answered yes. But after trial the district court concluded as a matter of law that there had been no proof of breach of the warranty of fitness for a particular purpose because Freeman presented no evidence that he relied on Case in selecting a product particularly suited for his needs. *See* generally *Medcom, Inc. v. C. Arthur Weaver Co.*, 348 S.E.2d 243, 246 (Va. 1986) (discussing elements of breach of implied warranty of fitness for a particular purpose). For this reason, the court believed a retrial would be necessary to determine whether Case breached the warranty of merchantability because the jury could have answered the special verdict question in the affirmative without having found a breach of that warranty.

In the case at hand, however, it would not have been possible for the jury to find a breach of the warranty of

fitness for a particular purpose without also finding a breach of the warranty of merchantability. When, as here, the buyer's particular purpose is the same as the intended purpose of the product (lawn mowing), the two warranties are identical, except that to prove breach of the warranty of fitness for a particular purpose, the buyer must additionally prove that he informed the seller of his purpose and relied on the seller's judgment in selecting a product appropriate for that purpose. *See* Walter H.E. Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 Rutgers L. Rev. 493, 506-07 (1962), cited with approval in *Featherall v. Firestone Tire & Rubber Co.*, 252 S.E.2d 358, 367 (Va. 1979). These additional elements are the ones Freeman failed to prove.

Therefore, all of the elements of a breach of the warranty of merchantability would have been established by a jury finding of a breach of the warranty of fitness for a particular purpose. The jury could not have found a breach of the warranty of fitness for a particular purpose without also finding a breach of the warranty of merchantability. For this reason, the district court's conditional grant of new trial on the breach of warranty issue constituted a clear error of law and, therefore, an abuse of its discretion. *See Koon*, 116 S. Ct. at 2035; *Cooter & Gell*, 496 U.S. at 405.

V.

Finally, the district court made a preliminary determination that the jury's award of $3.8 million was "excessive." *Freeman*, 924 F. Supp. at 1473-74. In view of its grant of judgment to Case, the court did not explain its rationale nor did it make a final decision on the matter. Accordingly, we have no way of assessing this holding. However, we are confident that on remand the district court will carefully consider this question and will, as it indicated it would if the occasion presented itself, "further elaborate on

its decision that the verdict is excessive." *Id.* at 1474. We reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1626
CA-94-63-A

DANIEL FREEMAN, Plaintiff - Appellant

and

MARY FREEMAN, Plaintiff

v.

CASE CORPORATION, a/k/a J.I. Case Company,
A Tenneco Corporation; CASE INTERNATIONAL,

Defendants - Appellees

Filed: August 5, 1997

On Petition for Rehearing with Suggestion for
Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DANIEL FREEMAN,	)	
	)	CIVIL ACTION NO. 94-0063
Plaintiff,	)	
v.	)	MEMORANDUM OPINION
	)	
CASE CORPORATION,	)	BY: THE HONORABLE GLEN M. WILLIAMS
	)	
Defendant.	)	

Filed: April 19, 1996

This products liability case is before the court pursuant to 28 U.S.C. § 1332. Plaintiff Daniel Freeman was injured in a tractor accident. Freeman sued defendant Case Corporation ("Case") under theories of defective design and breach of warranty, and, following a jury trial, was awarded $3.8 million. Case now moves for judgment as a matter of law, or, in the alternative, for a new trial, and also moves for remittitur of the damages awarded against it. The motion for judgment as a matter of law is granted.

FACTS

Daniel Freeman ("Freeman") is an experienced owner and operator of a wide variety of heavy and light industrial, home, and recreational equipment. Before buying the Case 1130 tractor that is the subject of this case, Freeman had used a smaller John Deere riding mower for many years to mow his lawn. The Deere comes equipped with an operator presence control ("OPC"), a safety device that quickly stops the mower blades if the operator's weight leaves the seat. Freeman decided to purchase a Case 1130 after seeing and

admiring one owned by an acquaintance. He visited a dealer, where he requested a Case 1130 and asked that it be fitted with a belly mower attachment. The tractor, so equipped, was later delivered to his home.

The Case 1130 does not have an OPC, but it comes with a rollbar and a seat belt. Together, a rollbar and seat belt are known in the trade as a Rollover Protection System, or ROPS. A ROPS is designed to protect an operator in a tractor tipover situation: the rollbar keeps the tractor from rolling all the way over, or provides protection if it does, and the seat belt keeps the operator within the zone of safety.

Upon receiving his Case 1130, Freeman examined portions of the accompanying manual, and also inspected the tractor itself. Prior to the accident, he had mowed his yard twice and spread fertilizer once with the tractor. On the day of his injury, Freeman was not using the seat belt. While mowing near a steep embankment in his back yard, Freeman drove the tractor over a partially buried boulder. Although the Deere had never done so, the mower blades of the Case 1130, being set slightly lower, struck the top of the boulder. Freeman immediately stopped the tractor, depressed the clutch to disengage power to the blades and the wheels, and raised the mower deck so that the blades would not strike the rock when restarted. His plan was to then release the clutch to spin the blades in the air, in order to determine if they had been warped by striking the rock. Freeman claims that his foot was on the brake pedal, which is located in close proximity to the speed ratio control pedal ("SRC").[1] He in fact had both the brake and the SRC depressed. Thus, when he released the clutch, the tractor moved forward over the edge of the embankment. Freeman was unable to stop or to regain control of the tractor. He leapt from the machine, but

---

[1] This pedal, which makes the tractor move forward, is analogous to an automobile's accelerator.

was struck by the blades and severely injured as the tractor rolled down the hill.

ANALYSIS

A postverdict motion for judgment as a matter of law is evaluated by the same standard as one made during trial. *See Crown Central Petroleum Corp. v. Brice*, 427 F. Supp. 638, 640 (1977). The standard for a party to receive judgment as a matter of law is a high one. The court will construe all evidence and inferences in the light most favorable to the non-moving party, and will grant the motion only if a reasonable trier of fact could reach no other conclusion. *Winant v. Bostic*, 5 F.3d 767, 774 (4th Cir. 1993). In doing so, the court will consider neither the weight of the evidence nor the credibility of witnesses. *Singer v. Duncan*, 45 F.3d 823, 826 (4th Cir. 1995); *L.M. Everhart Const. v. Jefferson County*, 2 F.3d 48, 51 (4th Cir. 1993).

The standard for granting a new trial is lower than that for judgment as a matter of law. Under Rule 59, the court will weigh the evidence and the credibility of the witnesses, and may in its discretion grant a new trial if it considers the verdict to be against the clear weight of the evidence. *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989).

With these standards in mind, the court now turns to the issues before it. Case's brief sets forth seven major arguments or classes of arguments: (1) Freeman failed to present sufficient evidence of an unreasonably dangerous design defect; (2) Freeman failed to present sufficient evidence that the implied warranty of fitness for a particular purpose was breached; (3) Freeman failed to prove that the alleged defects were the proximate cause of his injuries; (4) the expert testimony offered by Freeman should have been excluded as inadmissible; (5) the affirmative defenses of open

and obvious danger, contributory negligence, assumption of the risk, and unforeseeable misuse bar recovery; (6) two jurors improperly tested the tractor during a showing; and (7) the verdict was excessive. Although the court's decision to grant Case's motion for judgment as a matter of law renders many of Case's arguments moot, the issues raised are of legal interest and are likely to be useful to any court that may review this decision. Each shall be discussed in turn.

I. Evidence of Unreasonably Dangerous Defect

At trial, Freeman attempted to prove two design defects in the Case 1130 tractor. First, he presented evidence that the brake pedal was placed dangerously close to the SRC, and that this proximity created an unacceptable risk of inadvertent engagement of the SRC by an operator trying to brake. Second, he contended that the absence of an OPC made the tractor unreasonably dangerous.

Under Virginia law, two factors are relevant to the determination of whether a product contains an unreasonably dangerous defect: industry or government safety standards, and consumer expectations. *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421 (4th Cir. 1993); *Mears v. General Motors*, 896 F. Supp. 548, 551 (E.D. Va. 1995). Proving a violation either of a safety standard or of consumer expectations can discharge a plaintiff's burden. *Alevromagiros*, 993 F.2d at 422.[2] If published safety

---

[2] The court misstated this fact in its decision in *Lemons v. Ryder Truck Rental, Inc.*, 906 F. Supp. 328, 331 (W.D. Va. 1995), where it said that the issue of consumer expectations is reached only if the plaintiff fails to demonstrate violation of a safety standard. The court knows of no Virginia case in which consumer expectations were considered without first or simultaneously considering the proof offered of violation of a

(continued...)

standards exist, the court will rely on these. Otherwise, it is "a matter of opinion of trained experts what design was safe for its intended use." *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d 675, 679 (1982). Merely conclusory expert testimony without substantial foundation will not discharge this burden. *Compare id.* (accepting sufficiency of expert testimony supported by manuals, data compiled by federal agency, consultation with other experts, experiments with product in question and other similar products, and mockup of product) *with Alevromagiros*, 993 F.2d at 421 (rejecting sufficiency of expert testimony based solely on inspection of the product in question).[3]

To demonstrate consumer expectations, the plaintiff may use "evidence of actual industry practices, knowledge at the time of other injuries, knowledge of dangers, published literature, and . . . direct evidence of what reasonable purchasers consider defective." *Alevromagiros*, 993 F.2d at 420-21 (citing *Sexton v. Bell Helmets*, 926 F.2d 331, 337 (4th Cir. 1991) (applying Kentucky law)). Expert testimony on this issue may not simply be conclusory, but "requires a factual examination of what society demanded or expected from a product." *Sexton*, 926 F.2d at 337.

---

[2](...continued)
safety standard, but it appears that such an analysis is possible under Virginia law.

[3] This is not an issue of the admissibility of proffered expert testimony, *see generally* Part IV of this Opinion, but simply a restatement of the familiar rule that a party with the burden of proof must come forward with enough evidence to sustain a verdict in its favor or face an adverse judgment as a matter of law. *See Alevromagiros*, 993 F.2d at 421.

A. Pedal Configuration

Freeman offered the expert testimony of Smith Reed, a mechanical engineer, to demonstrate that both the pedal configuration and absence of an OPC were unreasonably dangerous design defects. Reed testified to no published government or industry standard violated by the pedal configuration.[4] The court must therefore determine whether Reed's testimony was sufficient to establish violation of an applicable unpublished safety standard. *Bartholomew*, 224 Va. at 430, 297 S.E.2d at 679. Reed stated that, in preparation for his testimony, he reviewed extensive trade literature and notes pertaining to the design of the Case 1130 and of other tractors of varying sizes and configurations, the design of tractors generally, trade journals, accident statistics, industry and military specifications, and other assorted materials. Transcript for 10/25/95 at 18-24. Reed inspected the tractor that injured Freeman, and performed "tests" on it by manipulating various controls, operating the tractor while attempting to recreate the sudden forward movement described by Freeman, and placing his foot on the brake and SRC pedals to test his theory that both could be engaged simultaneously. *Id.* at 28-29. He stated that his opinion that the pedal configuration was a design defect was based on "sound engineering judgment," on "what the competition is doing," and on various standards that were either not proven or not relevant. *Id.* at 39-40. Reed's "sound engineering judgment" was not a basis for his opinion, but rather a mere restatement of that opinion. Reed characterized his "sound engineering judgment" as follows: "[w]hen one knows that it is possible to cause a machine to unexpectedly come on, spontaneously start moving, and

---

[4] Although Reed testified in a deposition that ANSI 335.4 had been violated by the pedal configuration, he stated at trial that upon reconsideration he could not maintain this position. Partial Trial Transcript ("Transcript") for 10/25/95 at 62.

when one has the ability to minimize or eliminate the problem by the design and when the design has not been eliminated . . . the design should not be released for production." *Id.* at 39.

The foundation for Reed's opinion is somewhere between the extensive testing found sufficient in *Bartholomew* and the near-total absence of evidence rejected in *Alevromagiros*. The primary difference between *Alevromagiros* and this case is that Reed reviewed extensive literature prior to making his inspection. Whether this is sufficient is a difficult question, given the dearth of guidance on this subject in Virginia law. The court holds that Reed's testimony was not sufficient to carry plaintiff's burden, since nothing suggests that the literature reviewed significantly bolstered Reed's opinion that the design of the pedals was defective.[5]

This holding would ordinarily require the court to enter judgment as a matter of law for Case on this issue, but the court declines to do so, since Freeman's inability to prove a design defect may have been due to judicial error rather than his own lack of evidence. Reed's reference to the design practices of Case's competitors, one of the bases he mentioned for his opinion that the pedals were defective, may have foreshadowed illuminating testimony, both as to the issue of the applicable safety standard in the industry and as to what consumers expected. *See Redman v. Sentry Group, Inc.*, 907 F. Supp. 180, 183 n.2 (W.D. Va. 1995) (in absence of published standards, industry practice can be evidence of industry standards); *Alevromagiros*, 993 F.2d at 420-21 (industry practice relevant to consumer expectations).

---

[5] It is not clear that plaintiff could under any circumstances sustain the burden of proving that the pedal configuration of the tractor was defective. *See* footnote 12, *infra*. Because of its decision to grant judgment as a matter of law to Case on other grounds, the court does not reach this issue.

However, the court did not permit either side to introduce evidence of industry practice with respect to pedal placement. Transcript for 10/25/95 at 41. It is unclear whether this was erroneous under applicable Fourth Circuit law. *Alevromagiros*, which states that industry practices are relevant to determining consumer expectations, 993 F.2d at 420, also upholds a District Court's decision to exclude evidence of safety features on a competing product, *id.* at 421-22.[6] While it is unnecessary to reach the issue at this time due to its decision to grant Case's motion for judgment as a matter of law, if that decision is reversed and the case remanded, the court may then find it necessary to grant a new trial at which evidence of industry practices with respect to pedal placement would be heard.

B. Operator Presence Control

Reed testified that the absence of an OPC violated ANSI B71.1, a standard that by its terms applies to "lawn and garden" tractors. Both sides vigorously contested the issue of whether the Case 1130 is a lawn and garden tractor, presenting evidence about its size, weight, power, and "drawbar pull," a measure of pulling capacity. Although the 1990 ANSI definition of "lawn and garden tractor" excludes those with a drawbar pull over 1500 pounds, which the Case 1130 in question apparently exceeded, no such definition

---

[6] The language used hints that it may have been the fact that only one competing product was offered rather than the relevance of industry practice generally that led to the District Court's decision to exclude the proffered evidence. *Alevromagiros*, 993 F.2d at 422 (noting that the trial judge stated that "bringing in *one particular competitor's ladder* . . . and making that an industry standard, that is terribly misleading") (emphasis added); *Anderson v. National R.R. Passenger Corp.*, 866 F. Supp. 937, 944 (E.D. Va. 1994) (citing *Alevromagiros* for proposition that a single example cannot be used to establish an industry standard).

existed at the time the tractor was manufactured. In addition, Freeman presented evidence that Case advertised the tractor for suburban lawn care applications. The jury could quite reasonably have concluded that ANSI B71.1 was applicable to this tractor, and such a conclusion is not against the clear weight of the evidence. The court thus denies Case's motion for judgment as a matter of law and its motion for a new trial with respect to this issue.

II. Evidence of Breach of Implied Warranties

Case contends that Freeman did not present sufficient evidence that it breached the implied warranty of fitness for a particular purpose. Under Virginia law, to establish a breach of the warranty of fitness, Freeman must prove (1) that Case had reason to know the particular purpose for which Freeman required the equipment; (2) that Case had reason to know Freeman was relying upon Case's skill or judgment to furnish equipment meeting his requirements; and (3) that Freeman in fact relied upon Case's skill or judgment. Va. Code § 8.2-315; *Medcom, Inc. v. C. Arthur Weaver Co., Inc.*, 232 Va. 80, 84-85, 348 S.E.2d 243, 246 (1986). Case points to Freeman's testimony that he decided to buy a Case 1130 because he had seen a privately owned one in operation and "liked the looks" of it, Transcript for 10/23/95 at 51, and that when he purchased the tractor he did not speak to anyone at the dealership about the tractor and did not seek the advice of the dealer about it. Transcript for 10/24/95 at 61. Freeman responds that he ordered a mower attachment with the tractor, without specifying the model he desired, and was supplied with a particular model. This, he contends, is sufficient to create a jury question as to the issue of the warranty of fitness for a particular purpose. While this argument may be valid if the mower attachment was alleged to be defective, it appears from the facts that this particular piece of equipment worked all too well. The court grants

Case's motion for judgment as a matter of law as to the implied warranty of fitness for a particular purpose.

In addition to the warranty of fitness, Freeman argued that Case breached the implied warranty of merchantability. The court assumes without deciding that the evidence submitted as to defect was sufficient to carry the burden of proving a breach of this warranty. Unfortunately, the issue of breach of the two implied warranties was presented to the jury in the form of a combined special interrogatory, asking "[d]o you find by a preponderance of the evidence that the defendant breached an implied warranty of merchantability and/or fitness for a particular use and that the vehicle was thereby unreasonably dangerous?" The jury responded to this question in the affirmative. Because it is conceivable that the jury believed that the warranty of fitness for a particular purpose was breached and the warranty of merchantability was not, the court cannot conclude that the insufficiency of evidence of breach of the warranty of fitness is moot. Should it be required to confront the issue due to a remand, the court will be forced to order a new trial as to the issue of the warranty of merchantability.[7]

III. Proximate Cause

Virginia applies a "but for" test to tort liability. *See Wells v. Whittaker*, 207 Va. 616, 622, 151 S.E.2d 422, 428 (1966). Unless the alleged defect is a proximate cause of the

---

[7] The only way that the court could be forced to address this issue is if the judgment as a matter of law is reversed as to the issue of open and obvious defect (which bars recovery under both negligence and implied warranty theories) but upheld as to the issue of contributory negligence (which bars recovery only under negligence). This would squarely present the issue of whether some implied warranty was in fact breached, since Freeman could then recover only if he proved a breach of warranty.

plaintiff's injuries, there can be no recovery. *Butler v. Navistar International Transp. Corp.*, 809 F. Supp. 1202, 1207 (W.D. Va. 1991). The burden is on the plaintiff to show to a "reasonable certainty" that the alleged defect caused his injury. *Stokes v. L. Geismar, S.A.*, 815 F. Supp. 904, 908 (E.D. Va. 1993), aff'd 16 F.3d 411 (4th Cir. 1994). Freeman's theory of the accident is that he inadvertently engaged the SRC pedal while deliberately engaging the brake, and that this was due to the dangerous proximity of these pedals. Freeman maintains that the tractor would not have rolled forward after being fully stopped unless the SRC was engaged, *see, e.g.*, Transcript for 10/24/95 at 93-96, and so his theory directly puts to the finder of fact the question of whether the alleged defect was a proximate cause of his engaging the SRC. Given the jury's conclusion that Case is liable, it is obvious that it accepted Freeman's theory of the accident and thus found that the defect was a proximate cause of the accident. This finding was not against the clear weight of the evidence. Case's motions for judgment as a matter of law and for a new trial are denied as to this issue.

Case argues that the absence of an OPC was not a proximate cause of the accident.[8] According to the applicable industry standard, ANSI B71.1, an OPC must stop the mower blades within five seconds. Case contends that there is no evidence that the accident took more than five seconds to occur. Since the blades would therefore have been turning

---

[8] It is not clear that the absence of an OPC is relevant to causing "the accident," if that term means the chain of events that caused the tractor to roll down the hill. *Cf.* discussion of Virginia law on nonuse of seat belts in Part V(B) of this Opinion (stating that, under Virginia law, evidence of nonuse of seat belts is excluded because irrelevant to the cause of the accident). Because it finds for Freeman on the issue of causation as to both alleged defects, however, the court does not reach this issue.

when they struck Freeman, Case argues, the absence of an OPC is not a cause of the accident.

The evidence put on by Freeman was sufficient to discharge his burden of proof on this issue, because the jury could have concluded from the evidence presented that more than five seconds elapsed from the time Freeman left the seat to the time when he was struck by the blades. It is undisputed that Freeman jumped from the tractor and traveled forty feet from where he left the tractor.[9] After finding himself there, he thought "for an instant" that he was safe, but was then struck by the tractor as it rolled down the hill behind him. There was evidence that the tractor struck at least one tree before rolling over Freeman, that the blades struck numerous rocks and other objects that may have stopped them had an OPC disengaged the power to them, and that the tractor did not travel the forty feet to Freeman in a straight line. The jury could well have concluded from this reconstruction of events that it took the tractor more than five seconds to reach the point where Freeman was struck. In addition, although Freeman's expert testified that he did not know if Freeman would have been injured less severely if the blades had been moving more slowly, it is well within the competence of a lay juror to conclude that blades disengaged from the engine and decelerating would do less damage than blades at full speed and power. The jury's conclusion that the defects alleged were the proximate cause of Freeman's injury was not against the weight of the evidence. Case's motions are denied as to the issue of proximate cause.

---

[9] Whether Freeman traveled the forty feet entirely in the air or partially on the ground is a disputed fact, Transcript for 10/24/95 at 104-107, and one properly left to the jury to decide.

IV. Admissibility of Expert Testimony

On September 12, 1995, Case filed a motion in limine seeking the exclusion of the testimony of Freeman's mechanical engineering expert, Reed, under the authority of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786 (1993). In an unpublished memorandum opinion, the court denied the motion, holding that *Daubert* applies only to scientific evidence, of which Reed's proposed testimony was not an example. Case now revisits its arguments and asks the court to reconsider its ruling in light of seven recently decided cases. The authorities cited by Case are virtually identical in kind to those the court has previously rejected, and so the court will not again, as it did before, review each in detail. Of the cases cited, three involved testimony that was clearly scientific in nature. *Dunbar v. Shaklee Corp.*, 31 F.3d 638, 647 n. 15 (8th Cir. 1994) (toxicology and genetic mutation); *U.S. v. Rincon*, 984 F.2d 1003 (9th Cir. 1993), *aff'd without opinion sub nom Rincon v. U.S.*, 510 U.S. 801, 114 S. Ct. 41 (1993) (psychological testimony about the reliability of eyewitness identification); *Arnold v. Riddell, Inc.*, 882 F. Supp. 979 (D.Kan. 1995) (biomechanical aspects of spinal cord injury). Two of the cases are inapplicable because they did not apply *Daubert* in a relevant fashion. *Buckman v. Bombardier Corp.*, 893 F. Supp. 547 (E.D.N.C. 1995) (applying *Daubert* where party offering testimony claimed that it was scientific and based on comparative tests); *Anderson v. National R.R. Pass. Corp.*, 866 F. Supp. 937, 943-45 (E.D. Va. 1994) (citing *Daubert* for proposition that expert testimony must be based on some specialized knowledge and must have a factual basis).

The court notes that there appears to be a number of cases that apply Daubert to testimony the scientific nature of which is doubtful. *See, e.g., American & Foreign Ins. Co.*, 45 F.3d 135 (6th Cir. 1995) (testimony of an electrical

engineer as to testing he performed on a circuit breaker); *Pestel v. Vermeer Manufacturing Co.*, 64 F.3d 382 (8th Cir. 1995) (testimony about need for safety guard on stump cutter); *Byrnes v. Honda Motor Co.*, 887 F. Supp. 279 (S.D. Fla. 1994) (testimony about need for leg protection on motorcycle). Upon close scrutiny of *Daubert* and related authorities, the court can only conclude that these cases are misguided. The context of *Daubert*, the validity of "reanalysis" of raw data of epidemiological studies, was unquestionably scientific, and in its reasoning the Supreme Court relied heavily upon works in the history and philosophy of science. *See* 113 S. Ct. at 2796-97 (citing Carl Hempel's *Philosophy of Natural Science*, Karl Popper's *Conjectures and Refutations*, and several scholarly books and articles on peer review). Furthermore, the Court explicitly stated that its holding was addressed to the context of scientific evidence. After quoting Fed. R. Evid. 702's mandate that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto," the Court set forth the standards governing testimony pertaining to "scientific . . . knowledge," and clarified in a footnote that "Rule 702 *also applies* to 'technical, or other specialized knowledge.' *Our discussion is limited to the scientific context* because that is the nature of the expertise offered here.". 113 S. Ct. at 2795, 2795 n. 8 (emphasis added).

That *Daubert* is limited to a scientific context has been widely recognized. The Ninth Circuit, addressing the admissibility of the evidence in the *Daubert* case on remand, recognized that the Supreme Court's decision was addressed to the "scientific . . . knowledge" aspect of Rule 702. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1316 (9th Cir. 1995). In another case remanded to the Ninth Circuit for reconsideration in light of *Daubert*, the court again recognized that *Daubert* applied only to scientific

testimony. *U.S. v. Rincon*, 28 F.3d 921, 923 n. 3 (9th Cir. 1994). A correct understanding of *Daubert* is not limited to the Ninth Circuit. *See, e.g., Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995) (stating that *Daubert* interpreted "the admissibility of expert scientific evidence"); *Iacobelli Const., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (*Daubert* inapplicable to expert testimony on construction site conditions, contract documents and project results, because such testimony is not scientific); *Dunbar*, 31 F.3d at 647 n. 15 (listing 33 cases applying *Daubert* to such patently scientific matters as DNA analysis, chromatography, economic testimony, and psychological syndromes). The court must conclude that cases applying *Daubert* to merely technical testimony are aberrational. In any event, unless and until it is compelled by binding precedent to extend *Daubert* to a nonscientific context such as the examination of a tractor by a mechanical engineer, this court shall decline to do so. Case's motions as to the admissibility of Reed's testimony are denied.

V. Affirmative Defenses

Case has advanced four affirmative defenses which, though distinct, share a core of relevant facts and so will be addressed together. Case contends that the alleged defects were open and obvious, that Freeman's actions amounted to contributory negligence, that Freeman assumed the risk of his injury, and that Freeman's actions constituted unforeseeable misuse of the tractor. The court shall address each defense in turn.[10]

---

[10] These four defenses are so closely related that they are routinely conflated or at least analyzed simultaneously, but are nonetheless distinct. The law applicable to each defense is set forth in some detail in the appropriate section, but for ease of reference, the following chart distills the applicable Virginia law. For each

(continued...)

A. Open and obvious

Most jurisdictions have rejected the open and obvious defense to claims of design defect. *See Restatement (Third) of Torts*, Tentative Draft No. 2, § 2, Comment at V(4) (enumerating cases). Although the Fourth Circuit has recently held open the possibility that Virginia law could move in this direction, *Austin v. Clark Equip. Co.*, 48 F.3d 833, 837 (4th Cir. 1995) (*Austin I*) ("[w]e are not excluding the possibility that there may be an unreasonably dangerous product with an open and obvious defect"), it is clear that Virginia has not adopted the Restatement view. *See Austin v. Clark Equip. Co.*, 821 F. Supp. 1130, 1133 (W.D. Va. 1993) (*Austin II*) (manufacturer not liable for defective design

---

[10](...continued)
defense, the chart indicates whether it serves as a bar in negligence and in warranty, whether an objective or a subjective standard applies, and whose point of view is relevant. "Warranty" in this context refers to any implied warranty, whether of merchantability or fitness for a particular purpose. *See Wood v. Bass Pro Shops*, 250 Va. 297, 300-01, 462 S.E.2d 101, 103 (1995) (setting forth which defenses are applicable to "implied warranty" cases and which are not). The entries in the point of view row assume a conventional case in which an injured plaintiff sues a defendant; appropriate adjustments must be made if the positions are reversed, or if there are counterclaims.

	Open/Obvious	Contrib. Negl.	Assumpt. Risk	Unfrsbi. Misuse
Bar in Negligence	Yes	Yes	Yes	Yes
Bar in Warranty	Yes	No	No	Yes
Obj./Subj. Standard	Objective	Objective	Subjective	Objective
Whose Point of View	Plaintiff's	Plaintiff's	Plaintiff's	Defendant's

where danger is open and obvious); *Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 4, 399 S.E.2d 801, 802 (1991) (provider of cake not liable in negligence where plastic decoration swallowed by plaintiff was in plain view); *Wood v. Bass Pro Shops, Inc.*, 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995) (no recovery under implied warranty where alleged defect is "known, visible or obvious"). A plaintiff will be barred from recovering if he actually did know or should have known of the risk that caused his injury. *Austin I*, 48 F.3d at 836 (stating that risk is open and obvious if user "is or should be aware of the obvious danger"); *Scott v. City of Lynchburg*, 241 Va. 64, 66-67, 399 S.E.2d 809, 810 (1991) (actual knowledge of open and obvious danger bars recovery); *Harris-Teeter*, 241 Va. at 4, 397 S.E.2d at 802 (holding that danger in plain view bars recovery, without discussing any evidence of actual knowledge); *Spangler v. Kranco*, 481 F.2d 373, 375 (3d Cir. 1973) (holding that lack of bell on crane was open and obvious without discussing any evidence of actual knowledge). The open and obvious rule applies both to negligence and to breach of warranty claims. *Wood*, 250 Va. at 301, 462 S.E.2d at 103. This rule of law has been applied to bar recovery where the plaintiff complains of the absence of such features as a safety canopy on a coal mine roof bolter, *Belcher v. J.H. Fletcher & Co.*, No. 93-2424, 1995 U.S. App. LEXIS 11659, 1995 WL 300030 (4th Cir. May 18, 1995), a bell on a crane, *Spangler*, 481 F.2d at 375, and rear view mirrors, warning lights and alarms on a forklift, *Austin I*, 48 F.3d at 836. The question of whether an alleged defect is open and obvious is for the jury to decide, unless reasonable minds could not differ on the issue. *Id.*

Case contends that the dangerous proximity of the brake and SRC pedals is patently obvious upon inspection, and that the absence of an OPC is obvious upon inspecting the machine, rising from the seat while the mower is operating, or reading the manual. Freeman responds that while the

proximity of the brake and SRC pedals may be obvious, the danger presented by that proximity is not obvious. In addition, Freeman argues, the OPC is a hidden mechanism, not readily apparent or visible to an operator.

Freeman's argument that knowledge of the proximity of the pedals does not amount to knowledge of the danger posed by that proximity is a distinction without a difference. Such a distinction could under some circumstances defeat an open and obvious defense, as for example when a mechanism in plain view has an obscure and unexpected effect when engaged. No such circumstances exist here.[11] Freeman knew where the SRC pedal was, knew that it was close to the brake, and knew that depressing it would cause the tractor to move forward. Transcript for 11/1/95 at 7-14, 7-35. The risk of depressing the SRC, or of depressing a pedal where he knew the SRC to be without looking to see which pedal was depressed, was an open and obvious one.[12]

---

[11] Prior to hearing testimony, the court felt that this issue was uncertain enough to go to the jury. *Memorandum Opinion* of Oct. 13, 1995 at 12. For the reasons stated, the court is no longer of this opinion.

[12] The situation is analogous to that posed by the proximity of the brake and accelerator pedals in an automobile. In part to facilitate rapid access to both, these pedals are adjacent to one another and are often close enough to permit simultaneous engagement. This fact does not, however, constitute defective design. *See Jackson v. Mazda Motor of America, Inc.*, 872 F. Supp. 1464, 1467 (D.Md. 1995) (where plaintiff complains of sudden acceleration and testified that her foot was on the brake, but the only plausible cause of accident was inadvertent engagement of accelerator, no design defect exists); *Wells v. Jeep Corp.*, 532 P.2d 595, 597-98 (Wyo. 1975) (fact that driver inadvertently engaged accelerator while depressing brake does not render placement of accelerator and brake pedals defective). Because of the court's holding today granting judgment as a matter

(continued...)

The absence of an OPC was also open and obvious. Freeman had extensive experience with an OPC-equipped John Deere riding mower, had worked all his adult life with machinery of all types, had inspected the Case 1130 and read portions of the operator's manual, and had mowed the lawn twice with it prior to the accident.[13] Although an OPC is a "hidden" mechanism, it is one that has a noticeable effect upon the operation of a tractor-mower: when the operator's weight leaves the seat, the blades stop within five seconds. Given Freeman's experience, he either knew or should have known that the Case 1130 lacked an OPC, and so this absence was open and obvious.

The court has previously ruled that the pedal configuration and the absence of an OPC were open and obvious as a matter of law. Transcript for 10/31/95 at 6A-25 to 6A-26. This ruling was made in the course of dismissing Freeman's failure to warn claim against Case, but it disposes of the issues of negligence and breach of warranty as well.[14] Although some of the Virginia cases establishing the open and obvious defense are failure to warn cases, *see,*

---

[12](...continued)
of law to Case, it is unnecessary to address the issue of whether a design defect could be proven to exist with respect to the tractor's pedal configuration. The court's holding at this time is simply that the pedal configuration, *if* defective, was open and obvious.

[13] Although the tractor had nineteen hours of use recorded on a use monitor, no more than two uses of the tractor to mow his lawn, and one to spread fertilizer, for at least four hours of total use, are clearly attributable to Freeman. *See* Transcript for 11/1/95 at 7-13, 7-26 to 7-27, Transcript for 10/24/95 at 82.

[14] This ruling was made from the bench on the sixth day of trial, and the applicability of the open and obvious defense to the design defect and warranty claims was neither briefed nor argued at that time.

e.g., *Austin I*, 48 F.3d at 836; *Spangler*, 481 F.2d at 375, it is clear that the defense is applicable outside of the failure to warn context. *See*, *e.g.*, *Wood*, 250 Va. at 301, 462 S.E.2d at 103 (implied warranty); *Harris-Teeter*, 241 Va. at 4, 399 S.E.2d at 802 (negligence). Judgment as a matter of law is accordingly granted to Case as to both the design defect and the implied warranty claims because the risks were open and obvious.

B. Contributory negligence

Virginia follows a contributory negligence regime for products liability cases grounded in negligence. *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983); *Hoban v. Grumman Corp.*, 717 F. Supp. 1129, 1136 (E.D. Va. 1989). A plaintiff's contributory negligence will not, however, bar his recovery under a breach of warranty theory. *Wood*, 250 Va. at 300-01, 462 S.E.2d at 103. A plaintiff's negligence claim is barred by his contributory negligence if he failed to act as a reasonable person would have acted for his own safety under the circumstances. *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 358, 397 S.E.2d 821, 824 (1990). The standard is an objective one. *Id.* Unless reasonable minds could not differ on the issue, it is one for jury to decide. *Id.* at 358, 397 S.E.2d at 823.

Case contends that the following actions by Freeman constitute contributory negligence: failing to read the operating manuals and the safety warnings therein in detail, failing to wear a seat belt, and operating the tractor close to an embankment. Once the tractor was stopped at the edge of the embankment, Case argues that Freeman compounded his earlier acts of negligence by reengaging the mower blade rather than retreating in reverse or taking steps to immobilize

the tractor, and by "popping his foot off the clutch," rather than releasing it slowly.[15]

As an initial matter, the fact that Freeman was not wearing a seat belt cannot be taken into consideration under Virginia law. Virginia has never permitted evidence of failure to wear a seat belt to demonstrate the injured party's negligence in automobile cases. Until 1989, such evidence could be presented by the defense to reduce damages, but this practice was eliminated by Va. Code § 46.2-1094(E), which forbids evidence of nonuse of seat belts in a motor vehicle with respect to both liability and damages. Although no Virginia court has addressed the issue of whether automotive seat belt laws pertain also to the use of seat belts in a nonautomotive context, the Fourth Circuit has addressed the admissibility of evidence of nonuse of safety devices generally under Virginia law. *Garrett v. Desa Industries, Inc.*, 705 F.2d 721 (4th Cir. 1983). The plaintiff in *Garrett* was injured while using a stud driver without the included safety goggles. The trial judge permitted the defendant to raise the issue of nonuse of the safety goggles, and the Fourth Circuit reversed, analogizing the nonuse to the failure to wear a seat belt. The court considered persuasive the rationale of the leading Virginia case on the exclusion of evidence of failure to wear a seat belt, *Wilson v. Volkswagen of America*, 445 F. Supp. 1368 (E.D. Va. 1978):

---

[15] How quickly Freeman removed his foot from the clutch was a matter of significant dispute at trial. Transcript for 11/1/95 at 7-21; Transcript for 10/24/95 at 91-93. According to Freeman, however, the Case 1130 transmission is such that the motor engages fully and without slippage regardless of the speed of clutch release. Transcript for 10/24/95 at 92. The analysis that follows assumes without deciding that Freeman released the clutch in a normal fashion, as he now claims.

> We believe that the analysis in *Wilson* is both persuasive and directly applicable to the nonuse of safety goggles. The stud driver would have exploded whether or not Garrett was wearing safety goggles. His nonuse of the goggles was not a proximate cause of that explosion. Thus, since Desa did not demonstrate that Garrett's eye injury could have been avoided or would have been less severe had he been wearing the goggles, the requested jury instructions [that nonuse of the goggles was not evidence of contributory negligence] should have been granted. Furthermore, on remand, Desa may not introduce evidence of the nonuse unless and until it demonstrates the extent to which Garrett's injuries could have been avoided by wearing safety goggles.

Garrett, 705 F.2d at 726. Although it is clear that in 1983 the Fourth Circuit, faced with the case at bar, would have permitted evidence of nonuse of the seat belt to show mitigation of damages, it appears that it would not permit even this use today. At the time of the *Garrett* decision, Va. Code § 46.2-1094(E) did not exist. The Fourth Circuit simply applied then-existing Virginia law applicable to seat belts to the issue of nonuse of safety devices generally, finding the purpose and logic of the seat belt law analogous. Since neither the purpose nor the logic has changed, the court must conclude that nonuse of a safety device cannot be used in Virginia either in support of a defense to liability or in mitigation of damages. Freeman's nonuse of the seat belt will therefore not be considered in the court's analysis of any of Case's affirmative defenses.[16]

---

[16] Given Virginia's expansion of the scope of the exclusion of evidence of nonuse of a seat belt since *Garrett*, the Fourth Circuit may wish to reconsider its holding in that case, at least in circumstances such as are now before the court. Faced with the

(continued...)

The court now turns to Case's remaining contentions. Freeman's alleged failure to read the operator's manual is not so clear as Case maintains. Freeman testified to reading the manual, or parts thereof, in at least two places in his deposition. Freeman Depo. at 127, 155. In addition, he testified to the fact that he examined each of the controls and its function before starting the tractor for the first time. *Id.* at 115. The Case 1130 has a number of instructions printed directly on or near the controls, and so his inspection could well have included reading these as well. The court is most unwilling to conclude that a failure to read an operator's manual cover to cover is so clearly negligent that reasonable minds could not disagree. *Cf. Butler v. Navistar International Transp. Corp.*, 809 F. Supp. 1202, 1208 n. 9 (W.D. Va. 1991) (warning in tractor manual does not discharge manufacturer's duty to warn absent evidence that plaintiff read the manual). The matter was properly submitted to the jury, and the jury's decision was not against the weight of the evidence.

---

[16](...cortinued)
problem of providing for operator safety in the event of tractor tipover, Case provided an integrated safety system well-designed for the purpose, the ROPS. The failure of an operator to use a seat belt renders a ROPS useless as a safety device, reducing a system that would ordinarily prevent or greatly reduce injury to a nullity. It seems unduly harsh not to permit Case to argue that this nonuse was relevant either to negligence or to mitigation of damages, but such appears to be the law in Virginia. *Compare Long v. Deere & Co.*, 715 P.2d 1023, 1030 (Kan. 1986) (finding that Kansas statute excluding evidence of nonuse of seat belts in automobile cases has no bearing on issue of nonuse of seat belts with construction machinery "under conditions which admittedly will result in death or injury in a roll over unless seat belts are used"). There is no reason to suppose that the concerns that motivated the Virginia General Assembly to bar evidence of the nonuse of seat belts in automobile cases are identical to those relevant outside that context.

The testimony presented at trial on the issue of operating the tractor near an embankment was somewhat ambiguous as to the degree of risk presented. For example, Case's expert, Bernard Ross, testified that:

> the operator's manual says clearly that you should avoid operating on slopes and be very careful. And I'm not condemning Mr. Freeman for trying to mow his lawn up to the, close to the edge, but it is mentioned in the operator's manual that this is risky business, I mean, requires more caution, and more concern, and attention.

Transcript for 10/26/95 at 4-114 to 4-115 (testimony of Bernard Ross). It appears that simply operating the tractor close to an embankment is not necessarily contributory negligence. However, Freeman's decision to mow near the embankment must be considered in combination with his other actions. The evidence showed that Freeman stopped the tractor at or near the edge of the embankment, placed his foot in the immediate area where he knew the SRC pedal to be without checking to ensure that his foot was not on that pedal, depressed the SRC together with the brake,[17] and then released the clutch. Freeman knew that releasing the clutch with the SRC engaged would cause the tractor to move forward, Transcript for 11/1/95 at 7-35, but did not ensure that his foot was not on the SRC. He chose to do this rather than turn off the tractor, as the manual recommends when the tractor strikes an obstruction. He also could have

---

[17] Freeman testified that he was "positive" that he had his foot on the brake, Transcript for 10/24/95 at 6, and Freeman's theory of the accident is that the tractor could not have moved forward unless the SRC was also depressed. Transcript for 10/24/95 at 93-95. The issue of whether Freeman did or did not actually depress the brake pedal is not relevant to the court's reasoning on this issue.

eliminated the risk by placing the tractor in neutral or by backing away from the edge before restarting the blades. Transcript for 10/24/95 at 86; Transcript for 11/1/95 at 7-35. The court holds as a matter of law that Freeman did not act as a reasonable person would have acted for his own safety under the circumstances. *Artrip*, 240 Va. at 358, 397 S.E.2d at 824. This holding is in accord with, though not dependent upon, Virginia case law providing that a person who is aware of an open and obvious condition and, without excuse, forgets about the condition or ignores it thereby commits contributory negligence as a matter of law. *See Scott v. City of Lynchburg*, 241 Va. 64, 66-67, 399 S.E.2d 809, 810-11 (1991) (enumerating cases). Case's motion for judgment as a matter of law is therefore granted as to the negligence claim due to Freeman's contributory negligence.[18]

C. Assumption of the risk

Assumption of the risk bars a plaintiff's recovery in negligence, but not under a warranty claim. *Wood*, 250 Va. at 301, 462 S.E.2d at 103. This defense focuses on the injured person's subjective state of mind, asking whether "plaintiff fully understood the nature and extent of a known danger and voluntarily exposed himself to it." *Artrip*, 240 Va. at 358, 397 S.E.2d at 824 (citing *Philip Morris Inc. v. Emerson*, 235 Va. 380, 402-402, 368 S.E.2d 268, 280 (1988)). Unless reasonable minds could not differ on the issue, it is for the jury to decide. *Artrip*, 240 Va. at 358, 397 S.E.2d at 823.

Case contends that Freeman was aware of the proximity of the brake and SRC pedals, of the risks of mowing near an embankment, and of the danger posed by not wearing his

---

[18] As stated at the beginning of this section, this holding has no effect on the breach of warranty claim. *Wood*, 250 Va. at 300-01, 462 S.E.2d at 103.

seat belt, and that he voluntarily exposed himself to these risks. As before, the nonuse of the seat belt cannot be considered.

That a risk is open and obvious does not establish that a plaintiff "fully understood the nature and extent" of it. *Id.* Although the court today holds that the proximity of the brake and SRC pedals and the lack of an OPC were open and obvious, and that Freeman's actions constituted contributory negligence, the burden on Case as to these defenses was simply to show that Freeman knew or should have known of the risks. *Austin I*, 48 F.3d at 836 (open and obvious); *Artrip*, 240 Va. at 358, 397 S.E.2d at 823 (contributory negligence). The evidence was ample to discharge this burden, demonstrating as it did Freeman's extensive experience and the carelessness of his actions in light of that experience. However, this evidence does not rise to the level of discharging Case's burden to demonstrate "what the particular plaintiff *in fact* sees, knows, understands and appreciates." *Philip Morris*, 235 Va. at 402, 368 S.E.2d at 280 (quoting *Restatement (Second) of Torts* § 496D, Comment c (1965)) (emphasis added). The evidence presented was sufficient to support an inference that Freeman was actually aware of the risks, but was not so overwhelming as to compel such an inference. Because the court cannot say as a matter of law either that Freeman did or did not assume the risk of his injury, this issue was properly a matter for the jury, and the jury's decision was not against the clear weight of the evidence. Case's motions are accordingly denied as to this point.

D. Unforeseeable misuse

The defense of unforeseeabie misuse is available to a defendant sued under either negligence or warranty theories. *Wood*, 250 Va. at 301, 462 S.E.2d at 103. Although the language used to describe this defense sometimes suggests

that the manufacturer's subjective state of mind is at issue, *see Featherall v. Firestone*, 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979) ("unforeseen" misuse); *Turner v. Manning, Maxwell & Moore*, 216 Va. 245, 252, 217 S.E.2d 863, 869 (no liability when product used in manner "not intended" for it), the decisions make it clear that an ordinary reasonableness standard applies. *See id.* (holding that use of crane to pry fused metal parts free was not a "reasonably foreseeable purpose"); *Featherall*, 219 Va. at 964, 252 S.E.2d at 368 (use of different manufacturer's parts with a product is not a use that "should have been expected" by defendant). The issue is thus whether Freeman misused the tractor in a fashion not reasonably foreseeable to Case.

The actions that allegedly constitute misuse are Freeman's failure to wear a seat belt, which cannot be considered, his decision to mow near the embankment, and his "popping" the clutch. Case contends that under Virginia law, a manufacturer is entitled to a presumption that its warnings will be heeded. This does not appear to be true. In *Besser Company v. Hansen*, 243 Va. 267, 415 S.E.2d 138 (1992), the case cited for this proposition, the court considered whether the manufacturer reasonably should have foreseen that an operator would fail to heed the warnings on a control panel. The court reasoned that "[n]or did Besser *have reason to know or foresee* that an operator would not realize that danger and heed the warnings on the panel." *Id.* at 277, 415 S.E.2d at 144 (emphasis added). In reaching this conclusion, the court relied in part upon the testimony of a witness that the risk posed by ignoring the panel instructions was obvious. *Id.* Such testimony would of course be irrelevant if a manufacturer was entitled to a presumption that a failure to heed its warnings is unforeseeable.

The court must therefore consider whether Case has demonstrated that it should not reasonably have foreseen such

actions by operators as Freeman's decision to mow near an embankment. Case did not meet this burden. The use of riding mowers and of tractors with belly mowers on slopes, whether wise or not, is not an unknown phenomenon. In addition, the trial testimony of Case witness Bernard Ross, excerpted above, suggests only that "operating on slopes" should be avoided, and that mowing close to an embankment requires an increased level of caution. Transcript for 10/26/95 at 4-114 to 4-115. This evidence is insufficient to establish that Case did not and should not reasonably have foreseen that its 1130-series tractor might be used near the edge of an embankment.

As for Freeman's "popping" the clutch, evidence was presented from which the jury could conclude that Freeman released the clutch in a normal fashion. In any event, the rapid release of a clutch, an action Case characterizes as appropriate only during drag-racing or in an emergency, is certainly not unknown outside that context. For example, one of the difficult tasks in learning to drive an automobile with a manual transmission is mastering the skill of releasing the clutch neither too slowly nor too quickly. A person who, like Freeman, does not expect that his action will cause his conveyance to move, may well release the clutch rapidly, and this action may well be foreseeable. The foreseeability of this action, if indeed it occurred, was properly a matter for the jury.

Because the issue of foreseeable misuse was properly left to the jury, and because the jury's decision as to this issue was not against the clear weight of the evidence, Case's motions are denied.

VI. Juror Testing of Tractor

At trial the court allowed a "show" of the tractor involved in the accident, during which the parties pointed out

various features that they believed to be important to the issue of liability. One of these features, the placement of the brake and SRC pedals, was the subject of a significant amount of expert testimony and a number of photographs. After the demonstration, the court granted the request of two jurors to sit in the tractor in order to inspect it more fully. During this examination, the jurors observed the placement of the pedals from the operator's viewpoint, and both placed their feet on the brake and SRC pedals and depressed them several times.

Case asserts that these actions were improper and resulted in the consideration of extraneous material by the jury, improperly influencing its decision. Case maintains that this conduct requires a new trial on all issues. This court concludes that the inspection and examination of the tractor by the two jurors in the presence of the court, counsel for both parties, and the remaining jurors, was not improper and does not mandate a new trial.

Both parties rely on *United States v. Beach*, 296 F.2d 153 (4th Cir. 1961). In *Beach*, the jury convicted the defendant of perjury for testifying that he had not heard adding machines in a house he often visited. During its deliberations, the jury requested and received an electric drop cord. The Fourth Circuit held that sending the drop cord to the jury was error entitling defendant to a new trial if the jury used the cord to experiment with the adding machines. *Id.* at 159.

The present case is fundamentally different from *Beach* because of the circumstances and subject matter involved. In the case at bar, the only object considered was the tractor submitted for examination before open court. No other device was employed to test the tractor. Two of the jurors merely mounted the tractor and depressed its pedals in order to inspect it more closely. Such closer examinations are not

prohibited. In fact, *Beach* expressly allows closer inspections of exhibits on the part of the jurors even outside the presence of the court or counsel. *Beach* provides that "the mere making of a more critical examination of an exhibit than was made during trial is not objectionable." *Id.* at 159.[19]

The Tenth Circuit has also addressed the issue of closer examination of evidence by jurors. *Taylor v. Reo Motors, Inc.*, 275 F.2d 699 (10th Cir. 1960), involved consolidated actions for wrongful death and property damage against the manufacturer of a motor-freight tractor for alleged manufacturing defects in the heat exchange mechanism of the fuel system. During trial the heat exchange mechanism was introduced into evidence and was dismantled and reassembled by expert witnesses. The jury was permitted to take the mechanism to the jury room during its deliberations. In the course of its deliberations, the jury dismantled and reassembled the heat exchanger with pocket knives and other tools belonging to the jury. The Tenth Circuit held that the jurors' actions were proper for the purpose of testing the validity of statements made in open court. *Id.* at 705-706.

Although it is not binding, this court finds much of the Tenth Circuit's reasoning persuasive. While not necessarily willing to condone the unsupervised dismantling and reassembling of mechanical objects by jurors, the court agrees with *Taylor*'s holding that it is within the court's discretion to allow jurors to examine more closely evidence that has been the subject of relevant testimony. As noted, in the present case the jurors heard and saw substantial

---

[19] *Beach* further provides by way of example that "the use of a magnifying glass not introduced in evidence, without the knowledge and consent of the parties and without permission of the court, is not reversible error where such action involves merely a more critical examination of an exhibit." *Id.*

testimony concerning the location of the pedals. This was a major point of contention bearing on the issue of liability. The fact that jurors sat in the tractor and depressed the pedals does not constitute "extraneous evidence," as Case claims. On the contrary, the jurors' actions constituted a more critical examination of the evidence. Consequently, the court finds that Case is not entitled to a new trial based upon the actions of the two jurors.

VII. Remittitur

Case argues that the jury's award of $3.8 million is so excessive as to warrant a new trial or a remittitur of a portion of the award. Under Virginia law, a court has several options if it concludes that a monetary award is excessive. If "the evidence does not preponderate in favor of either party and the damage award is so large that it appears to be solely the product of sympathy," the court may order a new trial on all issues. *Bartholomew*, 224 Va. at 434, 297 S.E.2d at 682. If the monetary award is "out of proportion to the injuries suffered," but not so large that the jury's verdict as to liability is impeached, the court may put the plaintiff to the choice of accepting a remittitur or facing a new trial, Va. Code § 8.01-383.1, or may grant the defendant a new trial limited to the issue of damages, Va. Code § 8.01-383. *Bartholomew*, 224 Va. at 434, 297 S.E.2d at 682. The trial court has broad discretion to determine whether an award is excessive and what steps to take if it concludes that it is. *Id.* The Virginia Supreme Court has stated the duty of a trial judge thus:

> While a trial judge may not arbitrarily substitute his opinion for that of the jury, he has both the power and the duty to correct a verdict which he finds so excessive as to shock the conscience of the court or to compel the conclusion that the verdict was the

> product of passion or prejudice or some misunderstanding of the facts or the law.

Hogan v. Carter & Grinstead, 226 Va. 361, 372, 310 S.E.2d 666, 672 (1983). The court is of the opinion that the damages awarded were excessive. Because it grants judgment as a matter of law to Case, it is unnecessary to address this issue now.[20] Should the court's judgment in favor of Case be reversed, however, the court will on remand decide whether to grant a new trial on all issues, grant a new trial on the issue of damages only, or put the plaintiff to the choice of accepting a remittitur or facing a new trial. This decision is presently unnecessary considering the other holdings of the court. Should the issue recur, the court will further elaborate on its decision that the verdict is excessive and will hear additional argument of counsel on these issues.

CONCLUSION

For the reasons stated, the court grants defendant Case's motion for judgment as a matter of law. An appropriate order shall be entered this day.

The Clerk is directed to send certified copies of this Opinion to all counsel of record. This case shall be stricken from the docket.

ENTER: This 19 day of April, 1996.

/s/ Glen M. Williams
SENIOR UNITED STATES DISTRICT COURT JUDGE

---

[20] It would be difficult to analyze the issue of damages properly now, since the relevant portions of the trial testimony have not yet been transcribed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DANIEL FREEMAN and MARY FREEMAN,	)	
Plaintiffs,	)	CIVIL ACTION NO. 94-0063-A
v.	)	ORDER
CASE CORPORATION,	)	BY: THE HONORABLE GLEN M. WILLIAMS
Defendant.	)	

[Filed October 13, 1995]

For reasons stated in a memorandum opinion entered this day, it is ADJUDGED AND ORDERED as follows:

Defendants' motion for exclusion of expert testimony is denied. Defendant's motion for summary judgment is denied.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: This 13th day of October, 1995.

/s/ Glen M. Williams
SENIOR UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DANIEL FREEMAN and MARY FREEMAN,	)	
Plaintiffs,	)	CIVIL ACTION NO. 94-0063-A
v.	)	MEMORANDUM OPINION
CASE CORPORATION,	)	BY: THE HONORABLE GLEN M. WILLIAMS
Defendant.	)	

[Filed October 13, 1995]

In this products liability action arising from an accident involving a tractor-mower, defendant Case Corporation ("Case") moves to have the testimony of an expert witness excluded and moves for summary judgment. Both motions are denied.

DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY

Plaintiff Daniel Freeman ("Freeman") was injured when the Case 1130 tractor he was using to mow his yard rolled down a hill in a way which brought him into contact with the mower blades. Plaintiff has offered the testimony of Smith Reed, an expert in mechanical engineering, in order to identify a number of alleged defects in the design of the tractor which he claims are responsible for Plaintiff's injuries.

The admissibility of expert testimony is governed by Fed. R. Evid. 702.[1] Defendant moves to have this testimony excluded on the ground that it does not satisfy the standards imposed by FRE 702 as interpreted by *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). *Daubert* requires that evidence within its scope be "ground[ed] in the methods and procedures of science" and "supported by appropriate validation." *Id.*, 125 L.Ed. 2d at 481. Defendant urges that the testimony is defective because it lacks adequate scientific methodology and reproducible test results.

The first hurdle which Defendant must clear is that of establishing that *Daubert* is applicable to the type of testimony offered by Plaintiff. *Daubert*, the leading case on the evaluation of expert testimony at the boundaries of mainstream science, involved the controversial technique of "reanalysis" of the raw data of epidemiological studies to reach conclusions contradicting those of the original studies. The decision probes deeply into the subject of scientific methodology, and establishes a new guideline for ascertaining whether the scientific method has been applied with sufficient rigor to a particular theory to permit its introduction into court. Scholars and philosophers of science are cited in the course of the decision. *See, e.g., id.* at 483 (citing Carl Hempel's *Philosophy of Natural Science*, Karl Popper's *Conjectures and Refutations*, and several scholarly articles and books on the subject of peer review). The language of *Daubert* clearly delineates the limited scope of the decision

---

[1] FRE 702 provides as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

in more than one place. *See. e.g., id.* at 481 n. 8 (stating that "[o]ur discussion is limited to the scientific context").

Defendant urges that *Daubert* is applicable not only to such classical scientific subjects as epidemiology, but also to the testimony of Reed that various design elements of the tractor-mower were defective. In support of its position, Defendant points to language in *Daubert* itself, and to several decisions in the 4th Circuit and other jurisdictions purportedly applying *Daubert* in contexts analogous to the one before the court.

First, Defendant argues that footnote eleven of *Daubert* extends the application of that decision to nonscientific contexts. The context of the footnote does not support this interpretation. Footnote eleven annotates the following language: "Faced with a proffer of *expert scientific testimony*, then, the trial judge must determine. . . whether the expert is proposing to testify to (1) *scientific knowledge* that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 482 (emphasis added). On its face, then, the test which the footnote clarifies is inapplicable to nonscientific knowledge. Footnote eleven itself states that although the leading precursor decision to *Daubert*[2] focused on novel scientific techniques, the scope of FRE 702 is broader. In context, and taken together with footnote eight, quoted above, it is clear that the Court delineates three categories of evidence. The broadest is that addressed by Rule 702, and this includes scientific, technical, and other specialized knowledge. *See id.* at 481 n. 8. The next broadest is that addressed by *Daubert* itself, all *scientific* knowledge. *Id.* at 482 n. 11. The narrowest category is that of the superseded *Frye* decision, addressing only *novel* scientific techniques. *Id.* Footnote eleven is unhelpful to

---

[2] *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

Defendant; if anything, it further clarifies that *Daubert* applies only to scientific knowledge.

Defendant next cites several cases which, it claims, apply *Daubert* to facts sufficiently analogous to those before the court to suggest that the *Daubert* test should be applied here. Each is inapplicable. *Cavallo v. Star Enterprise*, No. 94-1499-A (E.D. Va. July 10, 1995) applies *Daubert* to the testimony of two doctors that exposure to petroleum fumes caused certain injuries in the plaintiff. In the context of a toxic tort case like *Cavallo*, where causation is often highly speculative, complex, and difficult to comprehend, the gatekeeping function of *Daubert* is clearly indicated, and only scientifically reliable evidence of (in this case) the link between petroleum vapors and human injuries should be presented to the jury. The court is now faced with a products liability suit for mechanical defect however, presenting very different issues.[3] In addition, *Cavallo* agrees

---

[3] The court is aware that the distinction between "scientific" and "non-scientific" knowledge is not marked by a bright line. At the margin, science shades indistinguishably into other areas of knowledge, and no principled stopping place exists between science and nonscience. If the facts before the court fell into such a marginal area, the court would be faced with a very difficult task of interpretation of the meaning of *Daubert*. No such difficulty exists, however, as the expert testimony which Plaintiff wishes to present is clearly not of the sort which is or should be addressed by *Daubert*. The difficulties of determining the causes of human ailments due to exposure to toxic or hazardous substances are well known by practitioners of medicine and law. Individual physical differences and alternate causes are two of the familiar confounding factors. When such issues are presented, the court appropriately demands the standards which science has imposed on like problems; those of epidemiology, which uses statistical analysis of large sample populations to control for the distorting effects invariably present when only one illness is examined. The

(continued...)

in every respect with this court's interpretation of *Daubert* as applicable only in a scientific context. *See e.g., id.* at *15 ("[a] variety of factors may affect the validity, or reliability, of a particular *scientific* expert opinion . . .") (emphasis added). Another case cited by the defendant, *Lam v. Upjohn Co.*, 1995 WL 441894 (W.D. Va. April 21, 1995), is inapposite for the same reason. The *Lam* court was faced with an expert arguing that the drug Halcion causes suidical behavior, with no scientific or other evidence to support the conclusion. *Daubert*, *Cavallo* and *Lam* all involved subtle issues of causation traditionally addressed by epidemiological methods. The case before the court involves mechanical engineering, an area in which such methods are unnecesary and inappropriate. See supra footnote 3.

---

[3](...continued)
methods of epidemiology are not appropriate in the context of mechanical engineering, which is governed by well-understood laws of physics. A piece of metal of known dimension and composition will predictably fail under a particular stress without variance caused by its individual constitution, or whether it has been exposed to cigarette smoke, or whether cancer runs in its family. *Daubert* defines the test to be applied when an expert testifies to a fact of the sort ordinarily established by epidemiological methods, and otherwise does not apply.

In addition, if courts were to apply the rigorous standards of *Daubert* and its progeny (including peer review and studies with repeatable and repeated results) to routine products liability suits alleging mechanical defects, plaintiffs would be required to engage the services of major scientific institutions to secure the sort of evidence necessary to recover. The absence of scientific studies, scholarly texts and journals, conferences, and the like in areas such as lawnmower safety and chainsaw design belie the supposition that this is what the Supreme Court can possibly have had in mind when it decided *Daubert*.

The next case cited by Defendant is *Habecker v. Clark Equipment Co.*, 36 F.3d 278, 289-90 (3d Cir. 1994). In the cited portion of that decision, the Third Circuit upheld the decision of the trial court to exclude the testimony of an Army safety director concerning a simulation he had performed of a forklift accident. The court need not address the issue of whether it agrees that the proffered testimony in *Habecker* was scientific, for two reasons. First, the decision of the trial court was upheld on several independent grounds, and so the Third Circuit's decision did not require an analysis of the applicability of *Daubert*. *Id.* at 289. Second, whether a simulation of an industrial accident is or is not scientific, it is certainly more scientific than an examination of a purportedly defective product after an accident. The court does not find the passing reference to *Daubert* in *Habecker* to be persuasive.

Defendant next cites *Byrnes v. Honda Motor Co.*, 887 F. Supp. 279, 281-82 (S.D. Fla. 1994). In *Byrnes*, the court excluded expert testimony that a motorcycle lacking leg protection is defective because the expert did not, as required by *Daubert*, test this hypothesis in a scientific manner. *Id.* *Byrnes* clearly supports Defendant's contention that *Daubert* is applicable to the analogous expert testimony of Smith Reed. This court, however, must decline to follow the reasoning of the decision for the reasons set forth in footnote 3.

The final case cited by Defendant in support of its claim that *Daubert* applies to Smith Reed's testimony is *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill. 1993). *Stanczyk* involved the admissibility of expert testimony that a power saw could be designed with a blade guard which exposed a much smaller amount of blade than did the design at issue in that case. There is no analogous testimony in the present case. Smith Reed's testimony supports the use of an operator presence control ("OPC"), a

common feature on riding mowers,[4] and wider separation of the brake and speed ratio control ("SRC") pedals, a design which is self-evidently feasible. There is no issue presented, as in *Stanczyk*, that the proposed design may be impossible to achieve from an engineering perspective.

Because *Daubert* is limited to scientific testimony, and because Reed's testimony is technical, not scientific, the court concludes that *Daubert* is inapplicable. This conclusion does not dispose of Defendant's arguments for the exclusion of Reed's testimony, as Defendant has advanced two arguments which do not rely upon *Daubert*. First, Defendant contends that the proffered testimony is insufficient on its own terms. For example, Defendant argues that there is no factual basis for Reed's conclusion that Plaintiff stepped on both the brake and the SRC pedals.[5] While it is true that an

---

[4] An operator presence control is a device which automatically cuts off power to the mower blades when the weight of the operator leaves the seat. It is Plaintiff's contention that such a device would have prevented or significantly reduced his injuries.

[5] In its 36-page Memorandum in Support of Motion to Exclude Expert Testimony, Defendant raises numerous issues with the same logical structure, offering detailed arguments for why Reed's opinions do not follow from the facts. For example, Defendant argues that Reed has not shown that an OPC would be statistically safer than a rollbar/seatbelt combination (such as the Case 1130 had), and that Reed did not establish that a warning would have prevented the injuries Plaintiff sustained. These arguments should be directed to a jury, and not to this court in a motion for exclusion. Like the argument concerning the SRC, addressed specifically in the text of this opinion, each of Defendant's arguments requires far too much of Plaintiff at this stage. The expert's testimony need not irrefutably establish each link in a logical chain, but need only be reasonably supported by

(continued...)

expert may not reach conclusions in the absence of any evidence to support them, *see Stover v. Norfolk & Western Railway Co.*, 249 Va. 192, 455 S.E.2d 238, 243 (1995), this does not mean that a fact must be irrefutably proved in order to be relied upon. Plaintiff has stated in his deposition that he depressed the brake pedal, and both Plaintiff's expert Reed and Defendant's expert Bernard Ross agree that the SRC had to have been depressed in order for the accident to occur. Reed Report at 18; Ross Report at 10, 11. Accordingly, there is sufficient evidence for Reed's assumption.

Defendant makes one final argument for the exclusion of the expert, urging the court to exclude Reed as a sanction for Plaintiff's allegedly wrongful videotaping of the examination of the tractor-mower by Defendant's expert. There is no rational relationship between this action and the testimony of Reed. The most appropriate sanction, if any, is the exclusion of the videotape itself. Because the sanction requested is inappropriate, the court declines to exclude Reed's testimony on this basis, without deciding whether the videotaping was or was not proper.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant argues that even if Reed's testimony is admitted, it is entitled to summary judgment. To prevail on a motion for summary judgment under Fed. R. Civ. P. 56(c), the moving party must demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v.*

---

[5](...continued)
the facts. The opinions expressed can be inferences, statistical probabilities, or - of course - opinions. Defendant's detailed factual arguments are misplaced here.

Catrett, 477 U.S. 317, 327 (1986). The burden is on the nonmoving party to "set forth specific facts" that demonstrate a dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In considering Defendants' motion, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to Freeman, the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Contributory Negligence

Defendant argues that this action is barred by Plaintiff's contributory negligence, about which no genuine dispute of material fact exists. Specifically, Defendant urges that recovery is precluded by Plaintiff's failure to read the operator's manual, his decision to use the mower with the blade in a position low enough to strike partially-buried boulders in the yard, his use of the mower near the edge of the hill where the accident occurred, and various details of his operation of the mower immediately after striking a boulder and immediately before the accident. If any of these actions by Plaintiff were so egregious as to constitute negligence as a matter of law, the court would be compelled to grant summary judgment to Defendant. *Airtrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 357, 397 S.E.2d 821, 823 (1990) The standard for whether contributory negligence exists is "whether a plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances." *Id.*, 240 Va. at 358, 397 S.E.2d at 824. Applying this test, the court concludes that a reasonable juror could find that an experienced user of mowers was not negligent in using a mower without reading the entire manual, with the blade low, near a hill, and following familiar procedures effective on a different model of mower when trouble occurred. This being the case, the court

defendant's motion for summary judgment as to the issue of contributory negligence.

Defendant next argues that the evidence offered by Plaintiff fails to establish each of the counts against it: specifically, that the Case 1130 mower is not reasonably safe for its intended use, that Defendant had a duty to warn Plaintiff of various dangers and that it breached this duty, and that Defendant breached warranties of merchantability and fitness for a particular purpose. The court will address each of these arguments in turn.

Safety of Mower for its Intended Use

Under Virginia law, a manufacturer must exercise normal care to produce a product which is reasonably safe for its intended use. *Turner v. Manning, Maxwell & Moore*, 216 Va. 245, 217 S.E.2d 863, 868 (1975). Defendant contends that Plaintiff has not met its burden of setting forth evidence creating a genuine dispute of material fact about each element of this claim. Defendant's arguments fall into two categories. First, Defendant argues that the opinions of Smith Reed are based on mere conjecture, rather than upon facts. These arguments, which are essentially restatements of arguments made by Defendant in its Motion to Exclude, have already been addressed and are hereby rejected.

The second argument advanced by Defendant is that Plaintiff's evidence omits certain vital elements. Defendant argues that Smith Reed's contention that an OPC would have prevented this particular accident does not, even if true, establish negligence, and that Reed does not identify a specific OPC device that would have prevented the accident. Plaintiff has, however, offered more than just a bare assertion by Reed that an OPC would have prevented this accident. Plaintiff points to numerous other tractor-mowers which have OPCs, contends that an engineer employee of

Defendant urged consideration of adding an OPC to the Case 1130 but that no action was taken, and argues that two American National Standards Institute ("ANSI") standards recommending (but not requiring) the use of OPCs were similarly ignored. This other evidence is sufficient in itself to create a genuine issue of material fact with respect to negligence.

Defendant's final argument on the issue of the reasonable safety of the Case 1130 tractor is that Plaintiff offered no evidence of a variance from industry standards, which Defendant contends is required by *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421-22 (4th Cir. 1993). The standard of *Alevromagiros* is not so difficult to meet as Defendant contends, however. The crucial issue in that case was whether plaintiff had met his burden of demonstrating that the product, a ladder, contained an unreasonably dangerous defect. This burden could be met, the court stated, by evidence of industry or government safety standards, or of consumer expectations, which in turn could be established by actual industry practice, literature, or direct evidence. *Id.* at 420-21. Plaintiff's expert testified only to the condition of the broken ladder, and not to the safety of an undamaged ladder of the same model, to industry standards, or to consumer expectations. In the absence of any such supporting testimony, the court found that the plaintiff had not met its burden of establishing that the ladder had an unreasonably dangerous defect. *Id.* at 421.

In the case at bar, as in *Alevromagiros*, Plaintiff's expert examined the damaged tractor-mower, not an undamaged but otherwise identical tractor-mower. The similarity with *Alevromagiros* ends, there, however. As stated above, Plaintiff offers evidence that Defendant's engineer urged consideration of an OPC, refers to numerous other tractors with OPCs, points to two safety standards allegedly violated by Defendant, and claims, through Reed, that the tractor-

mower contravened the reasonable expectations of consumers. Whether or not some of this evidence constitutes proof of an "industry standard," it is all directed towards the demonstration that the tractor-mower was unreasonably dangerous, and so presents a genuine issue for trial. *See id.* at 420-21. Defendant's motion for summary judgment is denied as to this claim.

Failure to Warn

Defendant challenges Plaintiff's claim that Defendant breached its duty to warn of the absence of an OPC and the dangerous proximity of the brake and SRC on three grounds. First, Defendant claims that Plaintiff's failure to read the operator's manual makes it impossible for Plaintiff to establish that the failure to warn caused his accident. Second, Defendant contends that it cannot be held responsible for not warning of the absence of a feature, since a legal burden would force it to issue thousands of warnings against all possible consumer misconceptions about its products. Finally, Defendant contends that the risk posed by the proximity of the brake and SRC pedal - if such a risk existed at all - was open and obvious, and that a warning would therefore have been superfluous.

Contrary to Defendant's contention, the evidence is not clear as to whether Plaintiff read the operator's manual for the Case 1130. Plaintiff testified to reading the manual, or parts thereof, in at least two places in his deposition. Freeman Dep. at 127, 155. In addition, Plaintiff testified to the fact that he examined each of the controls and their functions before starting the tractor-mower for the first time. Freeman Dep. at 115. The Case 1130 evidently has a number of instructions printed directly on or near the controls, and so his inspection could well have included reading any warnings which were or could have been given there. Viewing all facts in the light most favorable to

Plaintiff, it appears that Plaintiff could have been exposed to any warnings which Defendant chose to offer in the portions of the manual which he read, and on the machine itself. Summary judgment is accordingly denied as to this point.

Defendant's next contention is that it cannot be required to warn of absent features, since such burden would require a vast number of warnings. The relevant warning which Plaintiff contends should have been present, however, is of the absence of a major safety feature present on a large percentage of the tractor-mowers in production. The major safety features of any product are relatively few, and those which are common among similar products but absent in a particular model fewer still, far fewer than the "thousands" which Defendant suggests. The court cannot say as a matter of law that it is unreasonable to require such warnings, and so summary judgment is denied as to this point.

Finally, Defendant argues that the risk of the proximity between the brake and SRC pedals was open and obvious. Although the *proximity* was open and obvious upon inspection, the risk posed by such proximity was not so obvious. A reasonable juror could well conclude that such a risk would have been overlooked by a reasonably prudent person. Summary judgment is accordingly denied as to this argument.

Warranty of Merchantability

Defendant claims that Plaintiff's contributory negligence constitutes unforeseeable misuse of the product, and that his claim of breach of the warranty of merchantability therefore cannot stand. Contributory negligence is not a defense to a breach of warranty claim unless that negligence was unforeseeable. *See Jones v. Meat Packers Equipment Co.*, 723 F.2d 370 (4th Cir. 1983); *Euler v. American Isuzu Motors, Inc.*, 807 F. Supp. 1232, 1236 (W.D. Va. 1992).

In order to prevail on this point as it has argued it, Defendant must first show that Plaintiff was contributorily negligent, and then that this negligence was not foreseeable by Defendant. Because the court has found that a reasonable juror could conclude that Plaintiff was not contributorily negligent, we find that Defendant cannot meet this burden, and deny Defendant's motion for summary judgment as to the claim of breach of the warranty of merchantability.

Warranty of Fitness for a Particular Purpose

The elements of a claim of breach of warranty of fitness for a particular purpose are as follows: (1) knowledge by seller of buyer's particular purpose; (2) reason to know that buyer is relying on seller's implied warranty of fitness; (3) actual reliance by buyer. *Medcom, Inc. v. C. Arthur Weaver Co.*, 232 Va. 80, 348 S.E.2d 243, 246 (1986). Defendant claims that Plaintiff has failed to establish each of these elements. First, Defendant claims that it had no knowledge of Plaintiff's particular purpose, i.e., to mow a dangerously steep, boulder-strewn hill without wearing a safety belt and without reading the operator's manual. Any purpose can be made to look unknowable if narrowly enough defined, and Defendant goes too far in its characterization of Plaintiff's purpose. Because a resonable juror could conclude that Defendant was aware that Plaintiff's purpose was to mow variable terrain with reasonable safety, the court rejects Defendant's argument.

Defendant attacks the second and third elements of the cause of action by pointing to evidence that Plaintiff began his shopping with the intention of purchasing a Case 1130, and would not have purchased anything else. While this appears to be the case, Plaintiff certainly expected that the Case 1130, which appears to be advertised in part for the purpose of mowing lawns, could mow his own lawn safely. If Plaintiff's lawn is safe enough that a reasonably prudent

person would attempt to mow it with a Case 1130, and if the Case 1130 in fact is not capable of completing the job safely, then sale of the Case 1130 constitutes a breach of the implied warranty of fitness for a particular purpose. Because a reasonable juror could conclude that both of these conditionals are true, summary judgment is denied as to this point.

Punitive Damages

The final issue before the court is Defendant's motion for summary judgment as to Plaintiff's claim for punitive damages. Defendant argues that Plaintiff has not demonstrated that its negligence, if any, was so gross as to warrant an award of punitive damages. The standard for imposition of punitive damages is indeed high in Virginia, requiring that a defendant be "guilty of willful and wanton conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some known duty with the injurious result." *Infant C. v. Boy Scouts of America*, 239 Va. 572 (1990).

In the case at bar, Plaintiff has offered evidence that Defendant was aware that the absence of an OPC may be dangerous, in the form of deposition testimony tending to show that their engineer recommended consideration of installing such a device. Ben Coats Depo. at 124-28. Plaintiff's evidence also purports to show that OPCs are common in the industry and that various standards urge their use. Furthermore, Plaintiff has offered evidence suggesting that much information was available to Defendant regarding the danger of contact with mower blades. From this evidence, a reasonable juror could conclude that Case knew that injury would likely result from its failure to add an OPC

to the design of the Case 1130, and that it was reckless in not making this design change. Summary judgment as to the issue of punitive damages is therefore denied.

CONCLUSION

For the reasons stated, the court denies Defendant's motion to exclude the testimony of Plaintiff's expert Smith Reed, and denies Defendant's motion for summary judgment. An appropriate order will be entered this day.

The Clerk is directed to send certified copies of this Opinion to all counsel of record.

ENTER: This 13th day of October, 1995.

/s/ Glen M. Williams
SENIOR UNITED STATES DISTRICT COURT JUDGE

(2)

97-767

No. ~~97-797~~

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

CASE CORPORATION,

Petitioner,

v.

DANIEL FREEMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RECEIVED
DEC 1 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

J. FARREST TAYLOR
Counsel of Record
J. KEITH GIVENS
CHERRY, GIVENS, PETERS & LOCKETT, P.C.
163 West Main Street
Dothan, AL 36301
(334) 793-1555
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3188

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. Procedural Background 1

II. Factual Background 1

III. The Expert Testimony 4

ARGUMENT 9

I. Because Case failed to cross-appeal the District Court's ruling on the *Daubert* issue, this matter was not properly before the Fourth Circuit Court of Appeals 9

II. Because the Fourth Circuit Court of Appeals did not address the *Daubert* issue, the Fourth Circuit's judgment is an inappropriate vehicle for reviewing *Daubert* 11

III. The admission of Reed's testimony would survive appellate scrutiny even in those circuits Case claims correctly apply *Daubert;* therefore, this case does not involve expert testimony which would be treated differently among the circuits 14

IV. The split among the circuits on this issue reflects the flexible guidelines suggested by this Court 17

A. Expert witnesses are not given a "free pass" in the Fourth Circuit 17

B. There is no significant split among the circuits 20

TABLE OF CONTENTS – Continued

Page

V. When confronted with expert testimony, the circuits correctly focus their inquiry into the methodology as opposed to the ultimate conclusions 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 12

Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464 (1947) 13

Alevromagiros v. Hechinger, 993 F.2d 417 (4th Cir. 1993) 19

Bogosian v. Mercedes Benz of North America, Inc., 104 F.3d 472 (1st Cir. 1997) 20

Brown v. Auto-Owners Insurance Company, 121 F.3d 697, 1997 WL 547975 (4th Cir. 1997) 18

Cavallo v. Star Enterprises, et al., 100 F.3d 1150 (4th Cir. 1996) 19

City of Springfield v. Kibbe, 480 U.S. 257 (1987) 13

Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996) 23

Cummins v. Lyle Industries, 93 F.3d 362 (7th Cir. 1996) 22

Dancy v. Hyster Co., 1997 WL 590122 (8th Cir. Sept. 25, 1997) 16

Dandridge v. Williams, 397 U.S. 471 (1970) 12

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 578 (1993) ..... *passim*

Deimer v. Cincinnati Sub-Zero Products, Inc., 58 F.3d 341 (7th Cir. 1995) 16

Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 9

TABLE OF AUTHORITIES – Continued

Page

Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 12

Gowey v. United States, et al., 106 F.3d 390, 1997 WL 35348 (4th Cir. 1997) 19

Iacobelli Construction, Inc. v. County of Monroe, 32 F.3d 19 (2nd Cir. 1994) 21

Marts v. Hines, 117 F.3d 1504 (5th Cir. 1997) 10

Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873 (1996) 12

McKendall v. Crown Control Corporation, 122 F.3d 803 (9th Cir. 1997) 22, 23

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 9

Morley Construction Company v. Maryland Casualty Company, 300 U.S. 185 (1937) 9, 10, 13

Northwest Airlines v. County of Kent, Michigan, 114 S. Ct. 844 (1994) 9

Officer v. Teledyne Republic/Sprague, 870 F.Supp. 408 (D.Mass. 1994) 15

Peitzmeir v. Hennessy Industries, Inc. 97 F.3d 293 (8th Cir. 1996) 15, 22

Pestel v. Vermeer Manufacturing Company, 64 F.3d 382 (8th Cir. 1995) 22

Redman v. John D. Brush and Company, et al., 111 F.3d 1174 (4th Cir. 1997) 18, 20

Smelser v. Norfolk Southern Railway Company, 105 F.3d 299 (6th Cir. 1997) 22

Surace v. Caterpillar, 111 F.3d 1039 (3rd Cir. 1997) 15, 19, 20, 21

TABLE OF AUTHORITIES – Continued

Page

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 9

United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995) 19

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 13

United States v. Lee, 25 F.3d 997 (11th Cir. 1994) 23

United States v. New York Tel. Co., 434 U.S. 159 (1977) 9

U.S. v. Williams, 504 U.S. 36 (1992) 12

Watkins v. Telsmith, 121 F.3d 984 (5th Cir. 1997) 21

STATUES & RULES

Federal Rules of Evidence 702 ..... *passim*

Federal Rules of Evidence 703 17

STATEMENT OF THE CASE[1]

I. Procedural Background.

Daniel Freeman appealed the district court's judgment as a matter of law which overturned a jury's verdict in his favor. The district court ruled in favor of Case Corporation on issues related to liability and certain affirmative defenses. The district court, however, reaffirmed its earlier ruling that the analytical framework set out by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578 (1993), did not apply "to a nonscientific context such as the examination of a tractor by a mechanical engineer. . . . " Pet.'s App. 31a. Although it received an adverse ruling on the *Daubert* issue, Case did not cross-appeal this ruling to the United States Court of Appeals for the Fourth Circuit. Consequently, the Fourth Circuit made only a passing reference to *Daubert* in a footnote explaining that it was not addressing the issue.

II. Factual Background.

On May 22, 1992, Daniel Freeman was severely injured when his Case 1130 tractor ("1130") unexpectedly lunged forward and rolled over an embankment. C.A. App. 227. Freeman had purchased his 1130 in the fall of

---

[1] The "Statement of the Case" in the petition fails to present material facts, misstates certain facts in the record, and mischaracterizes other facts and events which occurred at trial. Specifically, Case paints a false picture of a runaway jury enflamed by the testimony of an unqualified expert. To understand the nature of the expert testimony and the inaccuracy in Case's description, it is necessary to understand the product and the background of the expert's testimony.

1991, but had stored it during the winter. C.A. App. 222-225. For the 17 years preceding his purchase of the 1130, Freeman had been mowing his lawn with a John Deere tractor without incident. When he was injured, Freeman was mowing his lawn for only the second time with his 1130 and was almost finished mowing when the mower blade glanced a rock. C.A. App. 1466, 1467.

In an attempt to falsely portray Freeman's actions as unreasonable, Case suggests that Freeman ran his 1130 into a "boulder." Pet.'s Br. at 2. As demonstrated by the record, such a characterization is misleading. The rock in question protruded only a few inches above the ground and was barely visible. C.A. App. 245, 246. At trial, the evidence was clear that the mower blade was the only part that contacted the rock. The rock which the mower struck was approximately 6 to 8 feet from the edge of an embankment. C.A. App. 265. After glancing the rock, Mr. Freeman pressed the clutch with his left foot, pressed the brake with his right foot, and raised the mower deck to clear the rock and to check for any damage to the blade. C.A. App. 227. Freeman intended to back the 1130 away from the embankment using the reverse position of the speed ratio control ("SRC"). C.A. App. 245.

However, when Freeman released the clutch with his left foot and with his right foot still on the brake, the 1130 lunged forward in the direction of the embankment. C.A. App. 227, 229. Because of the sudden lunge and speed of the 1130, Freeman could not stop the 1130 before it went over the embankment. This was not a "roll-over" accident as Case claims in its statement. Rather, Freeman intentionally jumped to the right of the 1130 in an attempt to clear himself of the out-of-control tractor. C.A. App. 359.

Freeman then rolled down the embankment approximately 40 feet from the place where he leapt from the 1130. C.A. App. 228. When Freeman stopped at the bottom of the embankment, the 1130, with the blades under full power, landed on top of him with the blades striking Freeman numerous times, causing large degloving slashes. C.A. App. 248.

Freeman's 1130 is equipped with a hydrostatic drive transmission. C.A. App. 221. With the hydrostatic drive transmission, the ground speed is controlled with a foot pedal located on the right side of the 1130 and known as the speed ratio control ("SRC"). C.A. App. 1793. The forward and reverse pedals are located on opposite ends of a rocker arm located on the operator's right side. C.A. App. 1793. The brake pedals are also located on the right side directly above the forward SRC. C.A. App. 1793.

The engine speed of the 1130 is set with a hand control. C.A. App. 1790. Once set, the engine speed requires no further input by the driver. To move the 1130 forward, the operator presses the forward SRC with his right foot. Slight pressure on the SRC will cause the 1130 to creep forward. More pressure on the SRC increases the ground speed of the tractor. C.A. App. 1793. If the pedal is pressed to its full extent, then the 1130 would be at a maximum ground speed at that given engine speed. If the operator removes his foot from the SRC, the SRC automatically returns to the neutral or park position and the tractor will stop without application of the brake. C.A. App. 1346, 1793. In effect, the automatic return to the park position functions as a brake for the 1130. If the clutch and the SRC are engaged, the 1130 remains still and the engine speed does not change. C.A. App. 1351.

Likewise, if the clutch is released and the SRC is not engaged, the 1130 will not move.

The mower on Freeman's 1130 was a "mid-mounted" mower which is also called a "belly" mower. C.A. App. 222. The power to the mower is supplied by the "mid-power takeoff" ("PTO") on the 1130. C.A. App. 1773, 1823. With the hydrostatic drive transmission, the clutch pedal has two positions. When the clutch pedal is released, both the transmission and PTO are engaged. C.A. App. 1795. When the clutch pedal is depressed, both the transmission and PTO are disengaged. C.A. App. 1795.

Before he was injured, Freeman had never used the brake on his 1130. C.A. App. 226. To stop the 1130, he simply released the SRC which was all that was required to stop the 1130. C.A. App. 226.

III. The Expert Testimony.

Freeman offered the testimony of Smith Reed, a mechanical engineer. C.A. App. 643. Reed had extensive experience as a practicing engineer. C.A. App. 646, 647. Particularly germane to this case was Reed's experience in the design and manufacture of lawn and garden tractors and mowing machines similar to the Case 1130. C.A. App. 647, 648. Part of Reed's responsibilities while employed by a manufacturer of lawn and garden tractors was to investigate accidents which involved products which were designed or manufactured under his direction. C.A. App. 651.

Reed opined that Freeman's 1130 was defective because of its pedal design which could cause the 1130 to lunge out of control and its lack of an OPC. In formulating his opinions, Reed reviewed the literature describing the design of approximately 20 other tractors of various sizes from manufacturers other than Case, the design documents for the 1130, and numerous publications dealing with safety concerns regarding mowing machines.[2] After learning the facts leading up to Freeman's injury, Reed personally tested Freeman's 1130 to determine the cause of the accident. From his testing, Reed determined that Freeman had inadvertently engaged the SRC pedal while pressing the brake. Reed's testing also revealed that the brakes were not capable of overriding the forward lunging motion of the tractor. C.A. App. 669.

At trial, Case defended its product with the testimony of Bernard Ross.[3] After Case attempted to establish Ross' qualifications as an expert, Freeman's counsel conducted a voir dire of Ross which exposed many glaring deficiencies in Ross' qualifications. While Ross held an

---

[2] While Reed had conducted an extensive review of industry practices, the district court sustained Case's objection to the admission of this evidence on the grounds that it was not relevant. In its post-trial opinion, the district court admitted that it may have committed error on this point.

[3] Case also hired Richard Schmidt to testify as a "human factors expert." Schmidt did drive an 1130. However, the 1130 driven by Schmidt was substantially different than Freeman's. For example, the 1130 driven by Schmidt did not even have a mower attachment and was equipped with a "scoop." C.A. App. 1363, 1364, 1385. Schmidt could not quantify the difference between the weight distribution between the 1130 he tested and Freeman's 1130.

undergraduate degree in mechanical engineering, his post graduate work was in the field of aeronautical and aerospace engineering. C.A. App. 770. Ross stated that he never conducted any research activities which involved mowers, riding lawn mowers, or garden tractors. C.A. App. 770. Ross had never been employed by a company that designed, produced, or manufactured mowers or tractors. C.A. App. 770. As a testifying engineer for over 30 years, Ross claimed expertise with 800 different products ranging from sliding glass doors to banana gantries, but this was his first opportunity to testify in a case involving a mower. C.A. App. 773. The last time Ross had any practical experience with the operation of tractors was in 1956 while working for a circus. C.A. App. 776. Ross lost his engineering license in 1991 over what he claims was a dispute over dues. C.A. App. 782. Ross testified that he is now willing to pay his dues but to regain his license he must pass an engineering exam which he refuses to take. C.A. App. 782. While Ross claimed that he had probably testified in cases involving tractors at some point during his 30 year career as an expert witness, there was no such indication on his resume nor could he recall the specifics of these cases. C.A. App. 787, 788. Ross was certain that he had not testified in a case involving a tractor within the last 5 years. C.A. App. 788. At the conclusion of the voir dire, Freeman sought to exclude the testimony of Ross because he lacked sufficient qualifications regarding this particular product. The district court overruled Freeman's motion to exclude Ross' testimony and allowed Ross to testify. C.A. App. 788, 789.

Rather than testing Freeman's 1130, Case chose to present tests involving a Kubota 2150 tractor through the testimony of Ross. These tests were borrowed from another products liability action involving a runaway Kubota tractor. C.A. App. 863. Ross was not involved in the case or the tests but merely talked with the engineer that was hired to defend Kubota. C.A. App. 863. The tests involved asking the operators to apply the brake upon a visual cue. C.A. App. 843. Ross gave no indication that the operators in these tests used the clutch which would mask inadvertent actuation of the SRC pedal similar to what happened to Freeman. C.A. App. 843. In this respect, the Kubota tests had little relevance to the circumstances leading up to Freeman's injury. Although Ross failed to conduct any tests on the 1130, he still billed Case $30,000 for his report outlining his opinions. C.A. App. 906.

At trial, the utility of having the SRC in proximity to the brake pedals was contested. According to L. D. Baker, Case's Safety Engineer who worked on the 1130, there is no reason for an operator to simultaneously engage the brake pedal and SRC with his right foot. C.A. App. 579. Even when differential steering is required or desired, simultaneous engagement of the SRC and the brake with the right foot is not necessary. According to Baker, differential steering is accomplished by locking the SRC in position, thereby freeing the operator's right foot to operate either the right or left brake. C.A. App. 579. Smith Reed, Freeman's expert witness, testified that there was no useful purpose in having the brake in close proximity to the SRC. C.A. App. 682.

Contrary to what plaintiff contends happened and what Reed's tests confirmed, Case's expert Ross testified that the brake "can defeat the motor in the mid-range, and eventually cause the engine to stall out." In fact, Ross added that this braking feature was the "fail safe aspect of this machine." C.A. App. 833. Ross formulated this conclusion without ever operating an 1130 unit. When Ross was given the opportunity at trial to verify his opinions to the jury utilizing Freeman's 1130, Case's counsel vigorously objected because Ross was not "skilled" in the operation of the 1130. C.A. App. 868.

An Operator Presence Control ("OPC") is a device used since the early 1970s that stops the mower blades if an operator leaves the seat. C.A. App. 680. OPC devices are designed to reduce or eliminate blade contact injuries and have been used since the early 1970's. C.A. App. 680. According to Reed, two standards were applicable to the 1130 which required the use of an OPC: ANSI/OPEI[4] B71.1, "American National Standard for Consumer Turf Care Equipment – Walk-Behind Mowers and Ride-On Machines with Mowers – Safety Specifications," and ANSI B71.4, "American National Standard for Commercial Turf Care Equipment – Safety Specifications." C.A. App. 684.

---

[4] American National Standards Institute/Outdoor Power Equipment Institute, Inc.

ARGUMENT

I. Because Case failed to cross-appeal the District Court's ruling on the *Daubert* issue, this matter was not properly before the Fourth Circuit Court of Appeals.

It is an inveterate and certain rule that an appellee may not attack a decree from a lower court "with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Morley Construction Company v. Maryland Casualty Company*, 300 U.S. 185, 191 (1937). Since *Morley* was decided, this Court has many times invoked this doctrine, explaining that although a prevailing party need not cross-appeal to defend a judgment on a ground rejected below, the prevailing party must file a cross-appeal if acceptance of the rejected contention would result in a modification of the judgment below. *See, e.g., Northwest Airlines v. County of Kent, Michigan*, 114 S. Ct. 844, 862 (1994); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) ("An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed"); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Case, however, did not cross-appeal the *Daubert* issue, even though the Fourth Circuit's acceptance of Case's *Daubert* argument would have logically resulted in a modification of the district court's judgment.

In the instant action, the district court denied Case's pretrial motion which argued that *Daubert* was applicable to all expert testimony, regardless of the nature of the expertise. In its post-trial motion, Case attempted the same arguments which were again rejected by the district court, but the district court granted Case's motion for judgment as a matter of law with respect to liability and certain affirmative defenses. Freeman appealed the district court's judgment as a matter of law. Because the district court ruled in favor of Freeman on the *Daubert* issue, Freeman did not raise the issue in his appeal. Without filing a cross-appeal, Case nevertheless argued that the district court's judgment was due to be affirmed in part because Reed's testimony was inadmissible under the criteria set out in *Daubert*.

In reply, Freeman argued, *inter alia*, that Case had not filed a cross-appeal and, therefore, Case could not attack the district court's ruling on this issue. Case sought to greatly enlarge its rights by substantially altering the district court's ruling.[5] Therefore, Case violated the inveterate and certain rule of *Morley*, and the Fourth Circuit was without jurisdiction to consider Case's *Daubert* argument.[6]

---

[5] As discussed later in this brief, Reed's opinions would "pass muster" in any circuit.

[6] A number of courts have held that the cross-appeal requirement is one governing the power or jurisdiction of the appellate court, while other courts have treated the cross-appeal requirement as a rule of practice. *See Marts v. Hines*, 117 F.3d 1504, 1507-1508 (5th Cir. 1997) (dissenting opinion) (providing comprehensive review of circuit decisions). But even in those courts adopting the less concrete "rule of practice

Case now petitions for certiorari on an issue over which the Fourth Circuit did not have jurisdiction and which was not addressed in the body of the Fourth Circuit's opinion. Because this action is plagued by jurisdictional irregularities, it is not an appropriate means for addressing *Daubert*.

II. Because the Fourth Circuit Court of Appeals did not address the *Daubert* issue, the Fourth Circuit's judgment is an inappropriate vehicle for reviewing *Daubert*.

The issues presented by Case to this Court were never decided by the United States Fourth Circuit Court of Appeals, perhaps in part because Case failed to cross-appeal the district court's ruling on *Daubert*.

Respondent submits that not only would it be imprudent to grant certiorari in this matter because the Fourth Circuit did not have jurisdiction over this issue, but also because the Fourth Circuit simply did not address this issue.

---

interpretation," the rule may only be waived in certain narrow circumstances. *Id.* "Where 'rule of practice' waiver of failure to appeal has been invoked it has almost always been in highly unusual cases involving three or more parties where the rights of the parties are interdependent and on the appeal by one party the appellate court changes the judgment in a way that adversely affects the rights of one non-appealing party as against another or eliminates the basis of the judgment against a non-appealing party." *Id.* at 1518-1519. Certainly, such circumstances did not exist when Case pursued its *Daubert* argument before the Fourth Circuit.

Case bases its entire petition for certiorari on a six-sentence footnote by the appellate court in its order reversing the trial court and reinstating the jury's verdict. Noting that Case appears to misunderstand the *Daubert* test, the Fourth Circuit specifically stated that it would not address Case's argument that *Daubert* should be applied to technical (or applied scientific) testimony. Accordingly, Case's alarmist assertion that the footnote, which specifically declined to even address the issue, represents the wholesale "adoption" by the Fourth Circuit of an approach which threatens the very existence of Rule of Evidence 702 is a gross mischaracterization of the Fourth Circuit's opinion and footnote. Respondent submits that because this issue was specifically not addressed by the Fourth Circuit, this case is not a "prototypical" one, and it would be improvident to rely on it in order to resolve any perceived circuit divisions.

This Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed below." *U.S. v. Williams*, 504 U.S. 36, 40 (1992); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"). Although this is a disjunctive test, *see Williams*, 504 U.S. at 40, this Court generally will not address arguments that were not the basis for the decision below. *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996). In fact, as a prudential concern, this Court has often times refused to address an issue that has not been passed upon below. *See e.g., Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542 (1960)

(holding "it would be unwise for [the Court] to grapple with these intricate problems, the solution to which requires a careful examination of a voluminous record, before they have been dealt with by the Court of Appeals"); *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 468 (1947); *cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987) (dismissing writ of certiorari as improvidently granted in part because Court of Appeals had not considered issue); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226, n.2 (1975) (noting that "[i]n the absence of decisions on these questions by the courts below, we decline to address them"); *Morley*, 300 U.S. at 191.

Case declares that "this case offers an ideal opportunity for further development of this important area of the law." Pet.'s Br. at 7 (internal citations omitted). Despite Case's declaration, however, the Fourth Circuit did not address this area of the law, merely acknowledging Case's argument in a footnote and determining that it was insufficient to serve as a basis for affirming the trial court's decision to grant judgment as a matter of law. Simply put, neither this six-sentence footnote nor *this case* can be considered a "holding," signaling a new approach or directive by the Fourth Circuit on *Daubert*. Rather, the only significance that should be attached to the appellate court's footnote is that the issue, at least in the context of this case, was so insignificant as to only warrant a footnote on the subject. This case has not been "passed on" below, and there is no appellate judgment for the Court to review. Accordingly, this case cannot be deemed an adequate opportunity for further development of *Daubert*.

III. The admission of Reed's testimony would survive appellate scrutiny even in those circuits Case claims correctly apply *Daubert*; therefore, this case does not involve expert testimony which would be treated differently among the circuits.

Certiorari should be denied because Reed was properly qualified as an expert witness under Rule 702 and would be allowed to testify even under the decisions Case views as correct statements of the law. Certiorari on this issue should be reserved for the case which presents expert testimony which conceivably would result in inconsistent rulings among the circuits.

Reed was uniquely qualified, especially when compared to Case's experts, to testify about the design of the 1130 because of his experience with similar products. Pet. App. at 9a. Reed had previously worked as a design engineer for Toro Inc., a company that manufactured mowers and tractors. C.A. App. 647. During his final three years with Toro, Reed held the position of chief product engineer. C.A. App. 647. As part of his duties while employed by this manufacturer, Reed was actively involved in the investigation of accidents involving mowers and tractors which were designed or manufactured under his direction. C.A. App. 651. When given the opportunity at trial to voir dire Reed on his qualifications as an expert, Case declined and allowed Reed to proceed with his expertise and knowledge unchallenged. C.A. App. 656. Reed provided the jury with uncontested "first hand familiarity" with issues involved in this case. Therefore, Reed was properly "qualified as an expert by knowledge, skill, experience, training [and] education" and could offer his opinions regarding the design of the 1130

under Rule 702. *Surace v. Caterpillar*, 111 F.3d 1039, 1055 (3rd Cir. 1997) (recognizing that while there was no "litmus test" to qualify as an expert, to be admissible, the witness must possess sufficient knowledge of the subject matter either through skill, experience, training, or education).

Having been properly qualified, Reed then provided the jury with sound opinions supported by the facts. Case's broad charge that "Reed did not testify that Case had failed to comply with any government, industry, or other safety standard applicable to the Case 1130" is not true. Pet.'s Br. at 4. Reed testified that Case violated two industry standards when it elected not to include an OPC device on the 1130. C.A. App. 684, 685, 725, 752.

Reed's testimony regarding the OPC easily satisfies the scrutiny found in those cases "applying" *Daubert* to engineering testimony about the efficacy of designs. For example, in *Peitzmeir v. Hennessy Industries, Inc.*, 97 F.3d 293 (8th Cir. 1996), the court affirmed the exclusion of the expert's opinion because the expert had never designed nor built the proposed safety devices and therefore had no factual basis to support feasibility. *Id.* at 298. At trial, Case stipulated to the feasibility of incorporating an OPC into the design of the 1130. C.A. App. 692. Case's stipulation demonstrates the fallacy of applying *Daubert* in design engineering "where general acceptance is the norm, not the exception." *Officer v. Teledyne Republic/Sprague*, 870 F.Supp. 408, 410 (D.Mass. 1994). Since Case stipulated to feasibility, Reed's testimony is admissible even under the circuits rigidly applying *Daubert*.

With respect to the pedal design, Reed personally tested Freeman's 1130 and found that when co-engagement occurred, the brakes would not override the forward movement of the 1130 thereby producing an unreasonably dangerous lunging motion. Although Freeman's 1130 was made available to Case, it did not conduct any similar tests on Freeman's 1130 even when given the opportunity at trial. As was the case with Reed's testimony on the OPC, Reed's testimony on the pedal design is admissible even under the cases ostensibly applying *Daubert*. *Dancy v. Hyster Co.*, 1997 WL 590122 (8th Cir. Sept. 25, 1997) (expert testimony was excluded because the product could have been tested but was not); *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995) (expert's opinion not admissible because the expert failed to conduct any studies or analysis to substantiate its opinion). Unlike the expert in *Deimer*, Reed did conduct tests on the product which verified his opinions. While Case may attack Reed's testing, such an attack must be done through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596.

Reed was properly qualified under Rule 702 to give testimony on the product involved in this litigation. Reed's opinions were supported by testing which satisfied even the most stringent applications of *Daubert* outside its intended scope. Because Reed's testimony would survive appellate scrutiny in any circuit, this case does not give this Court the circumstance to address the perceived "split" among the circuits.

Case purveys the very problem that it claims it seeks to remedy. That is, Case provided the jury with nothing more than "self-authenticat[ed] testimony from paid experts." Freeman, on the other hand, provided the jury with testimony from an engineer who not only tested the product but had years of design experience with similar products. Even assuming that there is a problem with self-authenticating experts escaping scrutiny, Smith Reed's testimony does not fall into this category.

IV. The split among the circuits on this issue reflects the flexible guidelines suggested by this Court.

A. Expert witnesses are not given a "free pass" in the Fourth Circuit.

Case erroneously equates the Fourth Circuit's refusal to apply the same scrutiny that is required for admission of novel scientific testimony to every conceivable expert opinion to a wholesale abandonment of the court's duty to screen expert testimony under Rules 702 and 703. While circuits employ the flexible rules of *Daubert* in slightly different ways, the result is largely the same: an assurance of a requisite degree of reliability. *Daubert*, 509 U.S. at 594 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.").

Case alarmingly claims that experts receive a "free pass" to testify in the Fourth Circuit although it does not provide any examples of such cases nor does it engage in any analysis of Fourth Circuit decisions regarding expert

testimony.[7] A review of the Fourth Circuit's decisions demonstrates that Case's claim is a gross exaggeration and that the Fourth Circuit correctly applies the requirements of the Federal Rules of Evidence when reviewing the admission of expert testimony.

* *Brown v. Auto-Owners Insurance Company*, 121 F.3d 697, 1997 WL 547975 (4th Cir. 1997) (unpublished decision). The Fourth Circuit affirmed the district court's exclusion of the plaintiff's expert. Although the expert was a professional engineer, the district court found that the expert's opinion was based on nothing more than subjective belief and unsupported speculation.

* *Redman v. John D. Brush and Company, et al.*, 111 F.3d 1174 (4th Cir. 1997). The Fourth Circuit reversed the district court's decision to permit an expert to testify regarding the standards related to the design and manufacture of safes because the expert lacked the requisite knowledge required under the Federal Rules of Evidence. According to the Fourth Circuit,

> [i]n the absence of an industry standard for burglar deterrence, it would be speculative and misleading for the expert to opine that the safe did not meet that undefined standard. *Cf. Alevromagiros*, 993 F.2d at 421 (rejecting expert testimony that amounts to mere "subjective opinion" because "[l]ike the Fifth Circuit, we are unprepared to agree that 'it is so if an expert says it is so.' " [citation omitted]).

---

[7] Case's alarm must be viewed with skepticism given the lack of qualifications of its own expert to testify about the product at issue in this litigation.

* *Gowey v. United States, et al.*, 106 F.3d 390, 1997 WL 35348 (4th Cir. 1997) (unpublished decision). The Fourth Circuit affirmed the district court's exclusion of all the plaintiff's expert witnesses because the experts' opinions lacked reliability.

* *Cavallo v. Star Enterprises*, 100 F.3d 1150 (4th Cir. 1996). The Fourth Circuit affirmed the district court's stringent interpretation of *Daubert* which excluded two toxicologists' testimony linking the plaintiff's chronic illnesses to her exposure to vapors from a petroleum spill.

* *United States v. Dorsey*, 45 F.3d 809 (4th Cir. 1995). The Fourth Circuit affirmed the exclusion of two forensic anthropologists under *Daubert* and the Federal Rules of Evidence.

* *Alevromagiros v. Hechinger*, 993 F.2d 417 (4th Cir. 1993). The Fourth Circuit rejected the expert's subjective opinion in a products liability case and affirmed the district court's judgment as a matter of law for the defendant.

As demonstrated by the cases set forth above, the Fourth Circuit like all other circuits requires experts to satisfy standards set out by the Federal Rules of Evidence which insure the requisite degree of reliability. A comparison of the Fourth Circuit cases addressing expert testimony with those circuits Case touts as correctly applying *Daubert* reflects a remarkable degree of similarity. For example, the Third Circuit in *Surace* excluded the testimony of an engineer who had extensive experience in mechanical and electrical engineering but had little or no

experience with "habituation."[8] *Surace*, 111 F.3d at 1055. Because habituation was central to the expert's opinions, the Third Circuit affirmed the district court's exclusion of the expert's testimony. *Id.* The Third Circuit's analysis in *Surace* is almost identical to that of the Fourth Circuit's in *Redman*.

B. There is no significant split among the circuits.

The "split" among the circuits is more one of semantics than substance. Even those circuits "applying" *Daubert* across the board do so with a great deal of flexibility when confronted with novel scientific testimony. That is, even those circuits applying *Daubert* across the board acknowledge that not all the *Daubert* factors are relevant to technical or other specialized knowledge and their analysis usually concerns traditional notions of reliability. In this respect, the circuits are quite uniform and all fall within the flexible framework envisioned by Rule 702 as demonstrated below.

* First Circuit. *Bogosian v. Mercedes Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1997). The language of this decision does not support Case's assertion that the First Circuit would apply the same analysis used for the admission of novel scientific testimony to other types of expertise. This is illustrated by the First Circuit's statements that "even if *Daubert's* specific discussion of the admissibility of scientific principles did not strictly apply

---

[8] Habituation is a phenomenon by which a person becomes immune to a particular stimulus through repeated and constant exposure.

to [technical expertise], the admissibility was still controlled by the requirement of factual relevance and foundational reliability" and that the "district court unartfully cited *Daubert* in making its ruling." *Id.* at 479. The First Circuit like the Fourth Circuit requires expert testimony to be factually relevant and reliable to be admissible.

* Second Circuit. *Iacobelli Construction, Inc. v. County of Monroe,* 32 F.3d 19 (2nd Cir. 1994). The Second Circuit found that the *Daubert* standards for evaluating novel scientific testimony did not apply to generally accepted principles; however, the court stressed that expert opinions must have a reliable factual basis.

* Third Circuit. *Surace,* 111 F.3d 1039. In *Surace, supra,* the Third Circuit did not endorse applying the "*Daubert* framework" to technical expertise as Case claims in its petition. Rather, the Third Circuit followed the requirements of Rule 702 and suggested that admissibility was determined by an expert's qualifications and experience with the subject matter of the proposed testimony.

* Fifth Circuit. *Watkins v. Telsmith,* 121 F.3d 984 (5th Cir. 1997). Although the Fifth Circuit held that *Daubert* applied to technical as well as scientific testimony, it recognized that "not every guidepost outlined in *Daubert* will necessarily apply to expert testimony based upon engineering principles and practical experience. . . . " *Id.* at 990. In such cases, the Fifth Circuit suggested that physical testing will often satisfy the standard of evidentiary reliability. In *Watkins,* the expert had failed to test his alternative designs and did not even make any drawings or perform calculations which would have substantiated his opinions. The Fifth Circuit stressed the

importance of testing, especially in those cases where the expert proposes an alternative design.

* Sixth Circuit. *Smelser v. Norfolk Southern Railway Company*, 105 F.3d 299, 304 (6th Cir. 1997). In this case involving an allegedly defective shoulder belt, the Sixth Circuit found that a biomechanical engineer's testimony was not admissible. The Sixth Circuit stressed the importance of testing and found that the expert had failed to perform any tests of the lap belt yet concluded it was in proper working condition.

* Seventh Circuit. *Cummins v. Lyle Industries*, 93 F.3d 362 (7th Cir. 1996). The Seventh Circuit recognized that "in some 'as applied' situations, some of the non-exhaustive factors noted by the Supreme Court in *Daubert* are worthy of less emphasis than in situations involving more abstract or novel scientific theory." *Cummins*, 93 F.3d at 367, n.2. In *Cummins*, the Seventh Circuit, operating under the manifestly erroneous standard, found that the district court did not err in excluding the testimony of the plaintiff's expert. The Seventh Circuit's opinion emphasized the importance of "hands-on" testing. *Id.* at 369.

* Eighth Circuit. *Peitzmeier*, 97 F.3d at 299; *Pestel v. Vermeer Manufacturing Company*, 64 F.3d 382, 384 (8th Cir. 1995). Similar to other circuits, the Eighth Circuit emphasized the role of testing. The Eighth Circuit also rejected the type of litmus test urged by Case stating that "[peer review] is not required for admissibility" and the court's recognition that such *Daubert* factors such as the "potential rate of error" is not always relevant.

* Ninth Circuit. *McKendall v. Crown Control Corporation*, 122 F.3d 803 (9th Cir. 1997). The Ninth Circuit found that

the *Daubert* framework was not applicable to expert testimony based upon engineering experience developed from the investigation of hundreds of accidents. Citing one of its earlier *Daubert* decisions, the Ninth Circuit stated that

> . . . *Daubert* only applies to the admissibility of 'scientific' testimony, is correct, at least in a narrow sense, as to *Daubert*'s applicability. However, if one views *Daubert* in a broader context, the *Daubert* Court is giving strong advice to district courts: in ruling on the admissibility, trial judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony. *See Daubert*, 509 U.S. at 590. In that sense, *Daubert* applies to all expert testimony.

McKendall, at 806-807, n.1.

* Tenth Circuit. *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996). The Tenth Circuit held that the *Daubert* factors have little relevance when the expertise is based upon experience or training. In such cases, the trial court must make a "preliminary finding that the proffered expert testimony is both relevant and reliable while taking into account '[t]he inquiry envisioned by Rule 702 is . . . a flexible one.' " *Id.* at 1519 (citing *Daubert*, 509 U.S. at 589-95).

* Eleventh Circuit. *United States v. Lee*, 25 F.3d 997 (11th Cir. 1994). The Eleventh Circuit never ruled on the issue raised in the petition. In this case, the Eleventh Circuit held that the data from scientific instruments was not exempt from *Daubert*.

Even those circuits, that is, the Fifth, Seventh, and Eighth, which specifically held that *Daubert* is not limited solely to novel scientific testimony, apply the *Daubert* factors only sparingly when confronted with technical expertise. Their approach in determining the admissibility of expertise in this area closely resembles the approach of those circuits refusing to apply the *Daubert* standards to non-scientific testimony. Both approaches stay within the flexible guidelines of Rule 702 to insure reliability, which is the touchstone of expert admissibility.

V. When confronted with expert testimony, the circuits correctly focus their inquiry into the methodology as opposed to the ultimate conclusions.

Case has failed to demonstrate that a conflict exists on this issue. The decisions described by Case follow this Court's directive that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully Submitted,

J. FARREST TAYLOR
Counsel of Record
J. KEITH GIVENS
CHERRY, GIVENS, PETERS
& LOCKETT, P.C.
163 West Main Street
Dothan, AL 36301
(334) 793-1555

Counsel for Respondent

November 1997

(3)

Supreme Court, U.S.
FILED
DEC 3 1997
CLERK

No. 97-767

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CASE CORPORATION,
Petitioner,

v.

DANIEL FREEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
DAVID F. ZOLL
DONALD D. EVANS
CHEMICAL MANUFACTURERS ASSOCIATION
1300 Wilson Boulevard
Arlington, Virginia 22209
(703) 741-5000

December 3, 1997

BERT BLACK *
JOHN W. PATTON
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
Counsel for *Amicus Curiae*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-767

CASE CORPORATION,

Petitioner,

v.

DANIEL FREEMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, *amicus curiae* the Chemical Manufacturers Association ("CMA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioner. The consent of the attorney for the Petitioner has been obtained, and a copy of the letter evidencing such consent has been provided to the clerk of this Court. The consent of the attorney for the Respondent was requested but refused.

INTEREST OF *AMICUS CURIAE*

CMA is a non-profit trade association whose member companies produce, market, and use industrial chemicals. Its members comprise more than 90 percent of the productive capacity for basic industrial chemicals in the

United States. The chemical industry employs over a million workers in this country, and produces about 1.9 percent of the U.S. gross domestic product. On a value-added basis, it is about 10.3 percent of U.S. manufacturing. It accounts for more than one dollar of every ten dollars of U.S. goods that are exported, which in 1996 amounted to over 60 billion dollars.

The interest of CMA in this case arises from the fact that its member companies routinely face unsubstantiated expert testimony. Such testimony often causes defendants to pay for damages and injuries they did not cause. The American consumer, in turn, also pays: prices go up and products are never developed or never brought to market. This Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has curtailed the use of such unsubstantiated expert testimony. The beneficial impact of *Daubert*, however, is threatened by the Fourth Circuit's decision in the instant case.

Because the expert evidence issue is so important, CMA monitors cases in the area and regularly files *amicus* briefs in significant cases. Thus CMA provides well-informed insight from the perspective of one of the major sectors of the American economy.

Respectfully submitted,

Of Counsel:
DAVID F. ZOLL
DONALD D. EVANS
CHEMICAL MANUFACTURERS ASSOCIATION
1300 Wilson Boulevard
Arlington, Virginia 22209
(703) 741-5000

BERT BLACK *
JOHN W. PATTON
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
Counsel for *Amicus Curiae*

* Counsel of Record

QUESTION PRESENTED

1. Whether the explanation of Federal Rule of Evidence 702 provided by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies to expert testimony if an expert purports to base his or her conclusions solely on experience and training, and not on the methodology and reasoning of the expert's field or discipline.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. THE FOURTH CIRCUIT'S "EXPERIENCE AND TRAINING" EXCEPTION WOULD ALLOW IMPROPER AVOIDANCE OF *DAUBERT*, AND IT CONFLICTS WITH HOLDINGS FROM OTHER CIRCUITS	5
II. THE "EXPERIENCE AND TRAINING" EXCEPTION TO *DAUBERT* IS AN IMPORTANT ISSUE THAT COULD AFFECT MORE THAN ENGINEERING EXPERT EVIDENCE	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995) 6
Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996) 3, 4
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*
Freeman v. Case Corp., 118 F.3d 1011 (4th Cir. 1997) 2, 4
Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir.), *cert. denied*, 117 S.Ct. 1552 (1997) .. 3
Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir.), *cert. denied*, 117 S.Ct. 73 (1996) 3, 7
Rutigliano v. Valley Business Forms, 929 F.Supp. 779 (D. N.J.), *aff'd*, 118 F.3d 1577 (3rd Cir. 1997) 7
Thomas v. Newton Int'l Enter., 42 F.3d 1266 (9th Cir. 1994) 7
United States v. Locascio, 6 F.3d 924 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994) 7
Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997) 3, 7

Miscellaneous:

Bert Black, et al., *The Law of Expert Testimony—A Post-*Daubert *Analysis, in* EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 9 (Bert Black and Patrick W. Lee eds., 1997) 6, 8
E. V. KRICK, AN INTRODUCTION TO ENGINEERING AND ENGINEERING DESIGN (2d ed. 1969) 8
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 6
6 THE WORLD BOOK ENCYCLOPEDIA (1991) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-767

CASE CORPORATION,

Petitioner,

v.

DANIEL FREEMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

Amicus curiae respectfully prays that this Court grant review in this case. No counsel for any party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of the brief. The consent of the attorney for the Petitioner has been obtained. A copy of the letter evidencing such consent has been provided to the clerk of this Court. The consent of the attorney for the Respondent was requested but refused.

INTEREST OF *AMICUS CURIAE*

The Chemical Manufacturers Association ("CMA") is a non-profit trade association whose member companies produce, market, and use industtrial chemicals. Its members comprise more than 90 percent of the productive capacity for basic industrial chemicals in the United States. The chemical industry employs over a million workers in this country, and produces about 1.9 percent of the U.S. gross domestic product. On a value-added basis, it is about 10.3 percent of U.S. manufacturing. It accounts for more than one dollar of every ten dollars of U.S. goods that are exported, which in 1996 amounted to over 60 billion dollars.

CMA is concerned about the Fourth Circuit's decision in this case because the court declined to apply the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to the testimony of an expert who articulated no reasoning or methodology, and provided no explanation for his conclusions. The expert's testimony derived only from his "experience and training." *Daubert*, however, requires federal trial judges to act as gatekeepers to determine "whether the reasoning or methodology underlying [an expert's] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The Fourth Circuit's approach would allow an expert to avoid gatekeeping scrutiny simply by claiming he or she used no methodology at all. *See Freeman v. Case*, 118 F.3d 1011, 1016 n.6 (4th Cir. 1997).

Because its member companies face putative expert testimony from many fields and in many different kinds of cases, the Fourth Circuit's "experience and training" exception to *Daubert* raises grave concerns for CMA. When experts are allowed to give opinions in court that are not based on the methods and principles of their field of expertise, defendants sometimes pay for injuries or dam-

ages they did not cause. The American consumer also pays: prices go up and some products are never developed or never brought to market.

Daubert has greatly reduced these problems by focusing attention on whether experts can provide reasoned explanations for how they reach their conclusions. The Fourth Circuit, however, would allow litigants a blatantly obvious and easy end run around *Daubert*. This approach was first announced by the Tenth Circuit in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996), but it has since been explicitly rejected by the Fifth Circuit in *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997). Other Circuits also have taken an approach closely akin to *Watkins*. *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir.), *cert. denied*, 117 S.Ct. 73 (1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir.), *cert. denied*, 117 S.Ct. 1552 (1997). Thus there is now a clear split in the Circuits regarding the Fourth Circuit's holding in this case. This split should be resolved in favor of gatekeeping and against the supposed "experience and training" exception to *Daubert*.

STATEMENT OF THE CASE

At one level this case is about a tractor accident and an engineering expert witness who ventured opinions about its design without explaining his methodology or his reasoning. Its importance, however, goes far beyond tractor accidents and engineering. The Fourth Circuit's holding that the admissibility of this expert testimony was not governed by *Daubert* raises serious questions about when and how courts should control the use of expert evidence.

The accident in this case involved a tractor equipped with a mower attachment. The tractor was manufactured by the Defendant (here Petitioner) Case Corporation ("Case"). The Plaintiff (here Respondent) was injured

while operating the tractor, which lurched over the edge of an embankment when the Plaintiff attempted to check the condition of the blades after hitting a rock. He had not turned off the engine, and though he jumped off the tractor, it rolled on top of him and he was struck by the mower blades. He alleged that a design defect in the configuration of the brake and accelerator pedals and/or the lack of an "operator presence control" caused this accident.

In support of his pedal configuration claim the Plaintiff proffered the testimony of a mechanical engineering expert, who opined that the position of the tractor's pedals constituted a design defect. The District Court denied Case's motion in limine seeking to exclude the engineering expert's testimony under the authority of *Daubert*, and the case proceeded to a Plaintiff's verdict.

Though still declining to apply *Daubert*, the District Court granted the Defendant's motion for judgment as a matter of law, holding that the expert testimony failed to meet the Plaintiff's burden of proof. The Fourth Circuit reversed, finding that the expert's testimony satisfied the Plaintiff's burden according to Virginia authority. Moreover, the Fourth Circuit affirmed the rejection of Case's *Daubert* challenge, holding *Daubert's* requirement that expert evidence must be based on valid reasoning or methodology did not apply because the expert had not articulated *any* reasoning or methodology. His testimony was not subject to gatekeeping because "where an expert relies on his experience and training and not a particular methodology to reach his conclusions, 'application of the *Daubert* [analysis] is unwarranted.' " *Freeman v. Case Corp.*, 118 F.3d 1011, 1016 n.6 (4th Cir. 1997) (alteration in original) (quoting *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996)).

SUMMARY OF ARGUMENT

The Fourth Circuit's reading of *Daubert* in this case raises a grave and fundamental question. Can *Daubert* be avoided if an expert simply disavows any reasoning or methodology and claims his or her opinion was based only on "experience and training?" The answer to this question must be no.

The ill-conceived "experience and training" test for admissibility would allow experts to avoid judicial gatekeeping when they cannot or will not explain the reasoning or methodology underlying their opinions. This test apparently would exclude the expert who ventures a bad explanation, but would admit testimony based on no explanation at all. Other courts that have considered the issue have recognized that when experts do not explain how they reach their conclusions the validity of their reasoning or methodology cannot be assessed by either the court or the jury, and their testimony should be excluded.

The supposed "experience and training" exception to *Daubert* is an important issue. The Fourth Circuit's holding, which misconceives the way in which engineers do their work, could be extended to other fields of expertise as well. Thus, it threatens the very foundation of *Daubert*. The Fourth Circuit's decision to exempt the expert testimony in this case from *Daubert* analysis was erroneous and should be reversed.

ARGUMENT

I. THE FOURTH CIRCUIT'S "EXPERIENCE AND TRAINING" EXCEPTION WOULD ALLOW IMPROPER AVOIDANCE OF *DAUBERT*, AND IT CONFLICTS WITH HOLDINGS FROM OTHER CIRCUITS.

The ill-conceived "experience and training" test for admissibility allows an expert to avoid judicial gatekeeping when the expert does not explain the reasoning or

methodology underlying his or her opinions. This approach would effectively eliminate *Daubert*, but it conflicts with holdings from other circuits that have recognized the need for experts to provide reasoned explanations for their conclusions.

The special knowledge that expert witnesses provide is comprised of both facts and the ability to reach conclusions based on those facts and on other evidence in a case.[1] For example, a chemist investigating the environmental effects of an oil spill is already knowledgeable about the density and solubility of certain types of oil. This information, in conjunction with case-specific factors such as the type of oil, water temperature, and wind conditions, provides the factual predicate for the expert's conclusions.[2] Yet, it is the expert's application of scientific principles to these facts that ultimately leads to a reasoned explanation for those conclusions.[3] *Daubert* requires a court to determine if that explanation is in fact valid and reliable.

In the instant case, the Plaintiff's engineering expert testified that a design defect existed but offered no reasoning or methodology for his conclusion. The Fourth Cir-

---

[1] As this Court noted in *Daubert*, "[the word 'knowledge'] 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.' *Webster's Third New International Dictionary* 1252 (1986)." 509 U.S. at 590.

[2] *See* Bert Black, et al., *The Law of Expert Testimony—A Post-*Daubert *Analysis, in* EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 9, 26 (Bert Black and Patrick W. Lee eds., 1997).

[3] *See also Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir.), *cert. denied*, 513 U.S. 1111 (1995) (noting hypothetically that in order to prove bumblebees typically take off into the wind, the testimony of a beekeeper who had observed bees for many years would be appropriate, but to explain *how* bumblebees fly, and *why* they take off into the wind, would require a different kind of expert, such as an aeronautical engineer).

cuit's decision not to apply *Daubert* and to admit this testimony permits experts to escape *Daubert* scrutiny simply by saying they used no methodology or reasoning. Several courts, however, have explicitly rejected the notion that unexplained and untested conclusions are admissible.[4] Most notably, the Fifth Circuit renounced the supposed "experience and training" exception to *Daubert*, stating that "it seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."[5] Thus, if allowed to stand, the supposed "experience and training" exception to *Daubert* woud permit experts to avoid gatekeeping when it is most warranted.

---

[4] *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.), *cert. denied*, 117 S.Ct. 73 (1996) (affirming exclusion of medical testimony regarding the cause of a heart attack because the expert had offered "neither a theoretical reason . . . [n]or any experimental, statistical or other scientific data from which . . . a causal relation might be inferred or which might be used to test a hypothesis founded on theory"); *Rutigliano v. Valley Business Forms*, 929 F. Supp. 779, 786 (D. N.J.), *aff'd*, 118 F.3d 1577 (3rd Cir. 1997) (excluding medical testimony regarding causation where expert had relied primarily on "expertise and experience"). The cases in which experts have been allowed to testify based primarily on experience have involved the kind of direct factual observations for which this approach may sometimes be appropriate. *See, e.g., Thomas v. Newton Int'l Enter.*, 42 F.3d 1266 (9th Cir. 1994) (reversing trial court's exclusion of testimony from experienced longshore worker regarding what is usually done to prevent falls down open hatches); *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994) (testimony about typical structure of crime families).

[5] *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997).

II. THE "EXPERIENCE AND TRAINING" EXCEPTION TO *DAUBERT* IS AN IMPORTANT ISSUE THAT COULD AFFECT MORE THAN ENGINEERING EXPERT EVIDENCE.

In this case, the "experience and training" exception to *Daubert* allowed a jury verdict based on engineering testimony that did not constitute valid engineering, but the importance of the Fourth Circuit's holding goes beyond engineering. It could result in relaxing the admissibility standard for any expert witness who seeks to venture opinions not grounded in the reasoning and methodology normally used in his or her field.

Engineering testimony based only on "experience and training" should not be admitted into evidence because the engineering profession requires more for the proper evaluation of a design. It is the "profession that puts scientific knowledge to practical use." [6] While scientists concentrate more on making discoveries, engineers work more at solving practical problems, but there is much overlap between the two fields, and present day engineers use science extensively.[7] Thus engineers, like scientists, should be required to provide reasoned explanations when they appear in court as expert witnesses.

Because most courts have applied *Daubert* to expert testimony from a wide variety of fields, the "experience and training" exception could affect far more than engineering or science. Based on a recent WESTLAW search, *Daubert* has been cited in well over 1000 federal and state court decisions in both civil and criminal cases. It has been used to address testimony from fields as diverse as "medicine, real estate appraisal, psychology, accounting, ergonomics, statistics, accident reconstruction, [and] survey evidence." [8]

---

[6] 6 THE WORLD BOOK ENCYCLOPEDIA 284 (1991).

[7] E. V. KRICK, AN INTRODUCTION TO ENGINEERING AND ENGINEERING DESIGN 33 (2d ed. 1969).

[8] Black et al., *supra* note 2, at 48-49 (citations omitted).

Thus this case is not just about one tractor accident and one expert witness. It could reverse post-*Daubert* progress in many areas and in many kinds of cases.

CONCLUSION

For the foregoing reasons *amicus curiae* urges this Court to review the Fourth Circuit's ruling in this case, and to reject the supposed "experience and training" exception to *Daubert*.

Respectfully submitted,

Of Counsel:

DAVID F. ZOLL
DONALD D. EVANS
CHEMICAL MANUFACTURERS ASSOCIATION
1300 Wilson Boulevard
Arlington, Virginia 22209
(703) 741-5000

December 3, 1997

BERT BLACK *
JOHN W. PATTON
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
Counsel for *Amicus Curiae*

* Counsel of Record

(4)

No. 97-767

Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CASE CORPORATION, *Petitioner*,

v.

DANIEL FREEMAN, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

16pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases:

Braun v. *Lorillard, Inc.*, 84 F.3d 230 (7th Cir.), cert. denied, 117 S. Ct. 480 (1996) 7

Brown v. *Auto-Owners Ins. Co.*, 121 F.3d 697, 1997 WL 547975 (4th Cir. Sept. 8, 1997) 8

Compton v. *Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), cert. denied, 117 S. Ct. 611 (1996) 4, 8, 9

Cummins v. *Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996) 9

Dancy v. *Hyster Co.*, 127 F.3d 649 (8th Cir. 1997) 7

Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) . . . . . *passim*

Deimer v. *Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1995) 7

Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) 3

McKendall v. *Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997) 9

Morley Const. Co. v. *Maryland Casualty Co.*, 300 U.S. 185 (1937) 4

Northwest Airlines, Inc. v. *County of Kent*, 510 U.S. 355 (1994) 4

Page

Peitzmeier v. *Hennessy Indus., Inc.*,
97 F.3d 293 (8th Cir. 1996),
cert. denied, 117 S. Ct. 1552 (1997) 9

Smelser v. *Norfolk Southern Ry. Co.*,
105 F.3d 299 (6th Cir.),
cert. denied, 118 S. Ct. 67 (1997) 7

Watkins v. *Telsmith, Inc.*, 121 F.3d 984
(5th Cir. 1997) 9

United States v. *Williams*,
504 U.S. 36 (1992) 5

Miscellaneous:

Bert Black, et al., *The Law Of Expert Testimony — A Post-Daubert Analysis*, in EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL (Bert Black and Patrick W. Lee, eds., 1997) 6, 10

Brief of the Chemical Manufacturers Association as *Amicus Curiae* 9

Michael Hoenig, *Developments Concerning Experts*, N.Y. LAW J. 3 (Nov. 10, 1997) 7, 9

Clifton T. Hutchinson & Danny S. Ashby, *Daubert v. Merrell Dow Pharm., Inc.: Redefining the Bases for Admissibility of Expert Scientific Testimony*, 15 CARDOZO L. REV. 1875 (1994) 10

Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Phamaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379 (1997) 9

REPLY BRIEF FOR PETITIONER

Respondent's brief is most notable for what it does *not* say. In particular, respondent does not contest the following critical points:

- Whether *Daubert* applies to testimony about applied science is an important and recurring question, particularly in product liability actions. Pet. 22-23.

- An engineer's opinion concerning whether a product is defectively designed is "scientific" in nature. Pet. 11-12.

- Smith Reed's testimony was essential to any verdict for Freeman. Pet. 3.

- Reed offered no explanation as to how the documents upon which he purported to rely actually supported his opinion that the pedal configuration of the Case 1130 was defectively designed. Pet. 3-4, 18-19, 24-25, 29.

- Reed's "testing" had nothing to do with the alleged defect in the pedal configuration — namely, the proximity of the pedals allegedly giving rise to a risk of inadvertent co-engagement. Pet. 4, 18.

- Case's *Daubert*-based challenge to Reed's testimony attacked deficiencies in his analysis, not his conclusions. Pet. 24, 29.

It is thus undisputed that the $3.8 million verdict here rests entirely on the testimony of a single expert, and the only data on which the expert relied — documents and testing for a *different type* of defect — are completely unrelated to the purported defect on which the Fourth Circuit upheld respondent's claim.

Instead of coming to grips with any of these issues, respondent resorts to a combination of diversionary arguments about irrelevant factual matters and strained efforts to evade or explain away the serious intercircuit conflicts on the important questions presented in

the petition. These arguments are unavailing. Further review by this Court is obviously warranted.

1. Respondent's effort to distract the Court begins almost immediately, with accusations that the petition "misstates" and "mischaracterizes" certain facts concerning the accident in which respondent was injured. Opp. 1 n.1. These facts, however, have no relevance whatsoever to the questions presented in the petition or to whether further review should be granted. In any event, respondent's accusations are manifestly untrue.[1]

In another diversionary tactic, respondent incorporates into his discussion of the expert testimony presented at trial a substantial amount of factual material that similarly has no bearing at all on the questions presented for this Court's review. The most glaring example is respondent's devoting more of his brief to attacking Case's experts (Opp. 5-7) than to defending his own. These arguments are doubly irrelevant because (a) the propriety of judgment as a matter of law for Case in no way depended on the testimony of its experts, and (b) Freeman did not appeal the district court's decision to admit the testimony of Case's experts. Respondent also devotes considerable space to discussing aspects of his own expert's testimony that are not at issue here. Reed's much-trumpeted *qualifications* (Opp. 4, 14-15) have never been contested by Case, and his testimony regarding the feasibility of and standards applicable to the operator presence control ("OPC") (*id.* at 8, 15) is not germane because the Fourth Circuit

---

[1] Respondent's insistence that Case misidentified the object that Freeman struck with his tractor as a "boulder" (instead of a "rock"), "[i]n an attempt to falsely portray Freeman's actions as unreasonable," Opp. 2, overlooks the fact that both the district court and the court of appeals described the object as a "partially buried *boulder*." Pet. App. 18a, 2a (emphasis added). And respondent's objection to Case's short-hand description of the action as resulting from a "roll-over" accident, Opp. 2, is inconsistent with respondent's own brief, which states that his injuries occurred when his tractor "unexpectedly lunged forward and *rolled over* an embankment." *Id.* at 1 (emphasis added).

based its decision entirely on the purported pedal defect. Pet. App. 6a n.3.

Respondent's focus on the irrelevant is telling. Indeed, as demonstrated below, the weak arguments advanced by respondent in an effort to dissuade this Court from granting certiorari on the first question — whether *Daubert* may be bypassed completely when an expert testifies about the application of scientific knowledge but purports to rely only on "experience" or "training" rather than on any "methodology" — simply confirm the importance of this question, which was squarely decided by the Fourth Circuit in accord with the approach of three other circuits but in conflict with six other circuits. As for the second question presented — whether *Daubert*'s command that courts focus not on "conclusions" but on "principles and methodology" precludes examination of the reasoning that connects the expert's hypothesis to his or her conclusion — respondent essentially provides no response at all, let alone a defense of the Fourth Circuit's holding, which, once again, conflicts with the decisions of several other circuits.

2. In arguing against further review of the first question presented, respondent presents four principal contentions. None is even remotely persuasive.

a. Respondent first insists that "jurisdictional irregularities" occasioned by Case's failure to cross-appeal the district court's *Daubert* ruling require denial of Case's petition. Opp. 9-11. This argument is frivolous. As respondent well knows, the district court granted judgment as a matter of law for Case, Pet. App. 48a, thus awarding Case the full measure of relief that it sought. It is well settled that "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). Thus, as respondent's own cases explain, "[w]ithout a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in

the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it.'" *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); accord *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994).

b. Respondent next contends that this case is an inappropriate vehicle for resolving important *Daubert* questions because the Fourth Circuit "did not address" and "never decided" the issues raised in Case's petition. Opp. 11-13. This, too, is an absurd argument. The court of appeals expressly "affirm[ed] the district court's rejection of the *Daubert* challenge * * * albeit on somewhat different grounds," holding that *Daubert* simply does not apply "[i]n cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusions." Pet. App. 9a-10a n.6 (citing *Compton* v. *Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), cert. denied, 117 S. Ct. 611 (1996)). Respondent's suggestion that the court of appeals did not reach an issue that it explicitly "affirm[ed]" is plainly untenable.[2]

Respondent's related contention that the court of appeals' pronouncement on Case's "*Daubert* challenge" is not a "holding" likewise is without merit. Nowhere in its discussion did the court suggest that its ruling was either unnecessary to the decision[3] or somehow without precedential effect. To the contrary, the rule that

---

[2] To be sure, as respondent notes (Opp. 12), the court of appeals did not decide whether *Daubert* applies generally outside the scientific context. See Pet. App. 9a n.6. But this is because the court held that *Daubert* does not apply when, as here, an expert relies solely on his experience and training. *Id.*

[3] In fact, the court considered only Reed's testimony in deciding whether respondent "present[ed] sufficient evidence that the pedal configuration and attendant hazard constituted an unreasonably dangerous design defect." Pet. App. 8a. Reed was the only expert who could have provided such evidence.

Daubert is inapplicable when experts rely on experience and training rather than methodology is now the law of the Fourth Circuit (and of several other circuits).[4]

Finally, respondent's intimation that resolution of the *Daubert* issues here would require examination of a voluminous record (Opp. 13) is yet another smokescreen. Respondent's only expert on the issue of the purported design defect in the pedal configuration was Reed, and as noted above, it is undisputed that the only bases for his opinion — the documents he reviewed and the "testing" he performed — have nothing at all to do with the purported defect upon which the Fourth Circuit's judgment rests: the risk that the brake and SRC pedals "could easily be inadvertently coengaged." Pet. App. 7a.

c. Next, respondent argues that certiorari should be denied because "Reed's testimony would survive appellate scrutiny in any circuit." Opp. 16. This is not true; although Reed's testimony would be admitted in the Second, Fourth, Ninth, and Tenth Circuits, it would be excluded in the Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. Pet. 13-15. In seeking to render Reed's testimony plausible, respondent spends most of this short section of his brief (pp. 14-17) discussing Reed's qualifications (*id.* at 14), his testimony concerning the OPC (*id.* at 15), and Case's experts (*id.* at 17) — none of which has anything to do with the outcome below or the questions presented for this Court's consideration. The issue here

---

[4] In any event, as respondent concedes (Opp. 12), a grant of certiorari is precluded "only when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Here it was both. Case pressed its *Daubert* concerns in the district court in a motion in limine and again in its motion for judgment as a matter of law. Then, even though Case obtained full relief in the district court, it again pressed the issue in the Fourth Circuit as an alternative ground for affirmance. See Pet. C.A. Br. 23-27. Case's *Daubert* argument has been passed upon (against it) every time it has been raised. See Pet. App. 50a-57a (motion in limine); Pet. App. 29a-31a (judgment as a matter of law); Pet. App. 9a-10a n.6 (court of appeals).

involves the flaws in Reed's *methodology* and the total absence of connective reasoning supporting his opinion that the pedal configuration of the Case 1130 was defectively designed. In a discussion that consumes just one page of his brief, respondent offers nothing but conclusory statements about Reed's qualifications and so-called "testing," which, according to respondent, "satisfied even the most stringent applications of *Daubert*." *Id.* at 16. Notably, respondent makes no effort to controvert Case's summary of the methodological flaws in Reed's testimony. See Pet. 3-4, 18-19, 24-25, 29. This silence speaks volumes, particularly in view of respondent's detailed expositions of the irrelevant matters noted above.

Respondent's assertion that Reed's testimony satisfied *Daubert* rests entirely on his assessment of just one of the factors set forth by this Court — testing performed by Reed that supposedly "verified his opinions." Opp. 16. But as Case pointed out (Pet. 4), the record amply demonstrates that these rudimentary "tests," were not the kind of controlled, analytical experiments that are the hallmark of good science. Bert Black, et al., *The Law Of Expert Testimony — A Post-Daubert Analysis, in* EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 45 (Bert Black and Patrick W. Lee, eds., 1997) ("The variety and severity of the tests at issue in any given case must be considered in applying the Court's testing factor"). Even more fundamentally, Reed's tests examined the wrong question. All that Reed could have hoped to have determined from his testing was whether the pedals *could be* activated simultaneously — an issue that Case conceded. In fact, Reed's testing established only that it is "plausible" to *deliberately* contact the two pedals at the same time. C.A. App. 668-669. Reed did not, however, conduct *any* tests on the question at issue: whether the risk of *inadvertent* co-engagement was sufficiently likely to pose an unreasonable danger.[5]

---

[5] Respondent has never disputed, in the trial court, court of appeals, or in his brief in opposition, that the controlled testing of inadvertent pedal coengagement introduced at trial by Case, Pet. 4 n.3, involved a pedal arrangement virtually identical to the Case 1130. Nor has respondent

In short, Reed's testimony cannot even satisfy the first *Daubert* factor, let alone any of the remaining factors that would be applied in the majority of other circuits. See, *e.g.*, *Dancy* v. *Hyster Co.*, 127 F.3d 649, 652 (8th Cir. 1997); *Smelser* v. *Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir.), cert. denied, 118 S. Ct. 67 (1997); *Deimer* v. *Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995). Nor has Reed provided any other support (*e.g.*, relevant literature or industry standards) for his opinion on the pedal configuration, let alone an explanation of the reasoning necessary to transform a hypothesis into an opinion, as would be required by a majority of circuits. As a result, Reed's opinion was nothing more than a restatement of an untested hypothesis.

d. Respondent finally insists that the split among the circuits on this issue does not require this Court's attention because it amounts to only "slightly different ways" of undertaking the "flexible" inquiry mandated by *Daubert*. Opp. 17-24. As explained in Case's petition, and briefly reiterated below, respondent's view has been effectively rebutted by the remarks of numerous courts and commentators pointing to the deeply divergent majority and minority approaches. See Pet. 13-21; see also Michael Hoenig, *Developments Concerning Experts*, N.Y. LAW J. 3, 7 (Nov. 10, 1997) (noting that the dispute over whether *Daubert* applies to applied science "clearly is heating up" in the circuits, and "is nothing less than a fundamental conflict

---

challenged the results of that testing, which showed that (a) inadvertent misapplication occurred at approximately the same rate (.2%) at which automobile drivers inadvertently misapply the accelerator and brake pedals, and (b) at no time in the testing, which involved more than 1,100 test drives, was there any significant application of both pedals. C.A. App. 833-835, 842-843, 2119. In contrast, Reed made no inquiry into the probability of mishaps occurring, even though that is an important factor that engineers weigh in designing safety features. Cf. *Braun v. Lorillard, Inc.*, 84 F.3d 230, 234 (7th Cir.) (Posner, C.J.) (under *Daubert*, "the district court is responsible for making sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work"), cert. denied, 117 S. Ct. 480 (1996).

going to the heart of how *Daubert* should influence trial court gatekeeping duties"). Notwithstanding respondent's attempt to evade the issue, the conflict is deep, mature, and in need of resolution by this Court.

Before getting to the circuit conflict, respondent takes an extended detour through the law of evidence in the Fourth Circuit. Opp. 17-20. This is yet another distraction; Case's petition is premised on the existence of a *inter*circuit, not an *intra*circuit, conflict. In any event, there is no conflict within the Fourth Circuit with regard to the questions presented here. All but one of the cases cited by respondent preceded this case, and the one post-*Freeman* case — *Brown* v. *Auto-Owners Ins. Co.*, 121 F.3d 697, 1997 WL 547975 (4th Cir. Sept. 8, 1997) — is unpublished, and therefore of no precedential value.[6] Moreover, none of the cases, either before or after *Freeman*, involved a "case[] like this one," in which an expert seeking to testify on aspects of applied science "relie[d] on his experience and training and not a particular methodology to reach his conclusions." Pet. App. 9a n.6. Thus, in *Freeman* itself, the Fourth Circuit treated the *Daubert* question as one of first impression in the circuit. The court did not even mention, much less rely on, any of the Fourth Circuit cases cited in respondent's brief. Rather, the court looked to the decisions of other courts of appeals and chose to follow the approach of the Tenth Circuit in *Compton*. There is no doubt that *Freeman* is the law of the Fourth Circuit on the issues presented here.

Respondent's suggestion that all of the circuits exhibit "a remarkable degree of similarity" (Opp. 19) in applying *Daubert* — that the split in the circuits "is more one of semantics than substance" (*id.* at 20) — is wishful thinking in the extreme. This Court need not take Case's word on the depth and severity of this division; courts and commentators have remarked repeatedly on it over the past year

---

[6] *Brown* involved an expert whose proffered testimony based on "personal observations" was excluded in a decision that explicitly applied *Daubert*. 1997 WL 547975, at *1. The order contains no discussion of *Freeman*, let alone any hint of a conflict between the two decisions.

or so since the Court denied certiorari in *Compton*. See Pet. 19-21; see also Hoenig, *supra*, N.Y. LAW J. at 7 ("Notwithstanding strong anti-*Compton* sentiments, some courts seem to be endorsing the purported distinction between science and 'applied science,' technical experience or training"; citing the Fourth Circuit's decision in the instant case and the Ninth Circuit's in *McKendall* v. *Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997), as the leading examples). Moreover, the terms used to describe the approach of the court of appeals here (and the Second, Ninth, and Tenth Circuits) — see, *e.g.*, *Watkins* v. *Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (describing this approach as "exactly backwards" and "untenable"); Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Phamaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379, 1409 (1997) (stating that this approach "turn[s] *Daubert* on its head") — indicate a deep divide on the substance of the *Daubert* inquiry. Simply put, one cannot set the *Freeman* and *Compton* opinions alongside of, for example, *Watkins*, *Cummins* v. *Lyle Indus.*, 93 F.3d 362, 367-368 (7th Cir. 1996), and *Peitzmeier* v. *Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997), and seriously contend that the former approach "closely resembles" (Opp. 24) the latter.

Finally, any "flexibility" in the majority approach with respect to particular *Daubert* factors (Opp. 17, 20, 24) does not extend to the basic *Daubert* premises that expert testimony involving engineering and other applied sciences must be a reliable product of valid reasoning from hypothesis to a conclusion that is relevant to an issue in the case. This is, in fact, the core of the rigorous inquiry demanded by *Daubert*, and it is notably absent from the approach of circuits that have eschewed *Daubert* in the applied science context.

Whether experts who cannot or will not explain the reasoning or methodology underlying their opinions may testify in court is a matter of vital importance in product liability litigation in this country. Pet. 22-23; see also Brief of the Chemical Manufacturers Association as *Amicus Curiae* 2-3, 5. This Court's review is plainly

warranted to resolve the otherwise intractable split among the circuits on this critical issue.

3. Respondent's two-sentence reply to Case's second question presented is no answer at all. Case does not dispute that the courts of appeals have endeavored to follow this Court's directive distinguishing between "principles and methodology" on the one hand, and "conclusions" on the other. *Daubert*, 509 U.S. at 595. But this simply begs the question. As noted in Case's petition (Pet. 23-30), the circuits are in obvious disagreement as to where the line separating the two should be drawn. A number of courts of appeals — including at least the Third, Fifth, and Seventh Circuits — have recognized that "in the context of *Daubert* the word 'methodology' has to mean the entire pattern of reasoning through which a conclusion is reached." Black, et al., *supra*, at 24 & n.56 (also noting that "methodology" is defined as "the processes, techniques, or approaches employed in the solution of a problem or in doing something"); see also Clifton T. Hutchinson & Danny S. Ashby, *Daubert v. Merrell Dow Pharm., Inc.: Redefining the Bases for Admissibility of Expert Scientific Testimony*, 15 CARDOZO L. REV. 1875, 1886 (1994) ("[I]t is *how* conclusions are reached, not *what* the conclusions are, that makes them 'good science'"). By contrast, the Fourth Circuit in this case (like the Eleventh Circuit, see Pet. 25-26) viewed objections to an expert's "analysis" as challenges to his conclusions, not his methodology. Thus, despite the fact that respondent cannot in hindsight offer even an explanation, let alone a defense, of Reed's "reasoning," the court of appeals deemed his testimony admissible and sufficient to uphold a multi-million dollar verdict. Reed's testimony plainly would have been excluded in the Third, Fifth, and Seventh Circuits. See Pet. 27-29 (collecting cases).

The divergent approaches of the courts of appeals to this Court's methodology/conclusions distinction, under which challenges to an expert's "analysis" are admissibility determinations in some circuits but jury questions in others, present a well-developed and frequently encountered conflict ripe for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

DECEMBER 1997

(5)

No. 97-767

Supreme Court, U.S.
FILED
DEC 22 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CASE CORPORATION, *Petitioner*,

v.

DANIEL FREEMAN, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONER

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

6 pp

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, petitioner respectfully draws to this Court's attention certain aspects of its recent decision in *General Electric* v. *Joiner*, No. 96-188, issued on December 15, 1997, that bear on the questions presented in the instant petition.

1. In *Joiner*, this Court explained that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." Slip op. 9. For that reason, a district court may appropriately exercise its discretion to exclude expert scientific testimony after concluding that "there is simply too great an analytical gap between the data and the opinion proffered." *Ibid.* This type of inquiry, however, is still foreclosed in the area of *applied* science (such as engineering) by the decision below, which squarely held that an expert who invokes his "experience" or "training" — and disclaims reliance on any "technique" or "methodology" of his or her professional discipline — can avoid scrutiny under *Daubert* altogether. And the Fourth Circuit is not alone: the Second, Ninth, and Tenth Circuits have all adopted a similar approach. See Pet. 17-21. Of course, when *Daubert* is thereby bypassed, the district court has no opportunity, in undertaking a preliminary "gatekeeping" assessment of the admissibility of proffered expert testimony, to ascertain whether "the studies upon which the experts relied" are "sufficient, whether individually or in combination, to support their conclusions." *Joiner*, slip op. at 9.

As this case illustrates, the approach of the Fourth Circuit is fundamentally at odds with *Joiner*.[1] The total absence of any logical connection between the "testing" and literature review performed by plaintiff's sole expert, Smith Reed, to his opinions on the purported design defect at issue here meant that his testimony was nothing more than a restatement of an untested hypothesis. See Pet. 3-4, 18-19, 24-25, 29. Expressed in the terms used by this Court in *Joiner*, the judgment below rested entirely on no more than the expert's "*ipse dixit*." *Joiner*, slip op. 9. *Joiner* clearly establishes that scientific testimony of this sort may be excluded.[2]

We believe that *Joiner* reveals the Fourth Circuit's error on the first question presented. After *Joiner*, the notion that an expert relying on "experience" and "training" may render conclusions without supplying an explanation of the reasoning and methodology supporting those conclusions is simply untenable. Nevertheless, it is likely that some courts of appeals will persist in the mistaken view that *Daubert* (and *Joiner*) have no applicability to "applied" scientific testimony. For that reason, if the Court declines simply to grant, vacate, and

---

[1] The *Joiner* Court's first holding — that "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence," slip op. at 9 — has no bearing on the issues presented in this petition, both of which are questions of law as to which no deference is given to either the district court or the court of appeals. See, *e.g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (rulings based on legal error necessarily constitute abuse of discretion).

[2] Reed's testimony, in fact, would not even have been admissible under the "weight of the evidence" methodology discussed in Justice Stevens's opinion. See slip op. 3-5 (Stevens, J., concurring in part and dissenting in part).

remand in light of *Joiner*, it should grant plenary review to resolve the clear conflict in the circuits (see Pet. 13-16) over whether *Daubert* applies to applied science testimony and if so, how.

2. Whether the district court has a gatekeeping function in areas outside of purely scientific testimony — and, in particular, in the applied science context — arises in countless cases every year. As Justice Breyer observed in his concurring opinion, "cases presenting significant *science-related* issues have increased in number" in recent years, placing new demands upon district judges charged with "making determinations about complicated scientific *or otherwise technical* evidence." *Joiner*, slip op. 2-3 (Breyer, J., concurring) (emphasis added). Indeed, the examples cited by Justice Breyer, including "[e]conomic, statistical, technological, and natural and social scientific data," *id.* at 3, illustrate the broad range of "science-related issues" that arise in litigation, of which engineering testimony is one of the most common. As we demonstrated (Pet. 13-16), six circuits apply this Court's teachings in *Daubert* (and presumably will apply *Joiner* as well) in dealing with these issues. In sharp contrast, the Second, Fourth, Ninth, and Tenth Circuits, have refused to apply *Daubert* in resolving certain recurring questions in the applied science context and in other areas of expert testimony. Given the significance of this question and the clear, well-developed, and intractable circuit split, this Court's review is plainly warranted.

3. This Court's decision in *Joiner* expressly recognized that "conclusions and methodology are not entirely distinct from one another," and that a district court, in making its threshold admissibility decision, may examine whether the "experts' opinions were sufficiently supported by the [data] on which they

purported to rely." Slip op. 7, 9.[3] However, like the Eleventh Circuit in *Joiner*, the Fourth Circuit held (in contrast to the approach of several other circuits) that a challenge to an expert's reasoning and analysis presented a jury question relating to the weight of the expert's "conclusions," rather than an admissibility question. See Pet. App. 9a n.6, 11a; see also Pet. 24-30; Pet. Reply 10. *Joiner* thus effectively answers the second question presented in the petition in Case's favor.

Nevertheless, in conjunction with deciding whether *Daubert* applies to testimony concerning the application of scientific knowledge, this case presents an opportunity for the Court to elaborate on the district court's role in analyzing the link between an expert's conclusions and data upon which they rest. For example, although *Joiner* makes clear that a district court does not abuse its discretion in excluding the testimony of experts who fail to supply reasons for their conclusions, slip op. 9, it does not address whether courts should routinely *require* an explanation when experts "extrapolate from existing data." *Ibid.* Additional guidance from this Court on that important subject would be of great assistance to the lower courts.

---

[3] Indeed, Case cited the Eleventh Circuit's opinion in *Joiner* as reflecting the same misguided approach as the Fourth Circuit below in regard to the purported ironclad distinction between methodology and conclusions. See Pet. 25-26; Pet. Reply 10.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should grant the petition, vacate the judgment of the Fourth Circuit, and remand this case for further proceedings in light of *Joiner*.

Respectfully submitted.

MICHAEL H. GLADSTONE
DABNEY J. CARR, IV
Mays & Valentine, L.L.P.
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1200

JAMES C. SCHROEDER
Counsel of Record
ALAN E. UNTEREINER
ROBERT M. DOW, JR.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

DECEMBER 1997